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APPENDIX

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR.

In the

Supreme Court of the United States

October Term, 1976

No. 76-[illegible]

TWENTIETH CENTURY MUSIC CORPORATION and MARY M. BOURNE,

Petitioners,

v.

GEORGE AIKEN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

Petition for [illegible]

Petitioners' Appendix

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Appendix A

Docket Entries for United States District Court for the Western District of Pennsylvania

Civ. No. 72-440

TWENTIETH CENTURY MUSIC CORPORATION
and MARY M. BOURNE,

Plaintiffs,

against

GEORGE AIKEN,

Defendant.

DATE	PROCEEDINGS
1972	
6- 2	Complaint filed.
6- 2	Summons issued.
6- 5	Copyright notice mailed Commissioner of patents.
6- 8	Summons returned served on deft. 6/6/72.
7- 7	Motion to Dismiss filed by Deft.
9-11	Notice of Arg. for 10/5/72 at 4:00 filed.
10- 6	Hearing on Motion to Dismiss held 10/3/72 and concluded before Weis, J. (Motion—Denied) (Memo filed) (Rep: None).
10-18	Order entered denying deft's Motion to Dismiss. (Weis, J.)
10-30	Answer filed.
11-14	Rule 511 invoked.
12-11	Notice of Preliminary Conference for 12/21/72 at 4:00 filed.

Appendix A

DATE	PROCEEDINGS
12-22	Hearing on Conference held 12/21/72 before Weis, J. and concluded. (Memo filed) (Rep: None) (Case not to be called until February 1973)
1973	
1- 2	Letter dated 12/22/72 to Judge Weis from Bernard Korman received and filed.
2- 1	Notice of trial for 2/8/73 filed.
2- 8	Non Jury Trial began before Weis, J. and taken CAV. (Memo filed)
3-19	Transcript of proceedings held 2/8 before Weis, J. (rep C R Shuff)
3-26	Opinion filed and Order entered directing that Judgment is entered against the deft and in favor of the pltf Twentieth Century Music Corp., in the sum of $250.00; Judgment is further entered against the deft and in favor of the pltf Mary M. Bourne in the sum of $250.00; further ordered that deft shall pay the costs incurred, such costs shall not include counsel fees. (Weis, J.)
3-26	Pursuant to Opinion filed and Order entered Judgment is hereby entered accordingly. Bernard Schaffler, Clerk.
3-26	Notices mailed.
4-25	Notice of appeal filed by deft. ($250.00 Costs Bond posted)
4-25	Copy of notice of appeal mailed Court of Appeals; copy of notice to opposing counsel; letters to all counsel of record and to Judge Weis.
5-21	Original record and exhibits mailed U.S. Court of Appeals.

Appendix B

Complaint Filed in the United States District Court for the Western District of Pennsylvania

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF PENNSYLVANIA

[TITLE OMITTED IN PRINTING]

Plaintiffs, complaining of the defendant, by Thorp, Reed & Armstrong, their attorneys, allege:

For a First Cause of Action, Plaintiff Twentieth Century Music Corporation Alleges:

1. This action arises under Title 17, U.S.C., as hereinafter more fully appears.

2. The plaintiff, Twentieth Century Music Corporation ("Twentieth Century") is the proprietor of the copyright in the musical composition "THE MORE I SEE YOU".

3. Defendant, George Aiken did, at the times hereinafter mentioned, and still does, own, control, manage, operate and maintain a place of business for public entertainment, accommodation, amusement and refreshment known as George Aiken Chicken, and located at Seventh Avenue, Liberty Avenue and Smithfield Street, in Pittsburgh, in the State of Pennsylvania.

4. Musical compositions were and are publicly performed for profit as part of the entertainment regularly provided at said place of business.

Appendix B

5. Prior to February 19, 1945, Mack Gordon and Harry Warren, citizens of the United States, created and wrote an original musical composition entitled "THE MORE I SEE YOU".

6. On February 19 and February 20, 1945, Twentieth Century as proprietor of the composition complied in all respects with Title 17, U.S.C., and secured the exclusive rights and privileges in and to the copyright of said composition, and received from the Register of Copyrights a certificate of registration, identified as follows: "CLASS E pub. No. 129660".

7. Since February 19, 1945, said composition has been printed and published in strict conformity with Title 17, U.S.C.

8. At the times of the acts of infringement hereinafter complained of, Twentieth Century was and still is the proprietor of the copyright in said musical composition.

9. A copy of Twentieth Century's copyrighted composition is hereto attached as Exhibit "A".

10. Defendant on March 11, 1972, and upon information and belief, at other times prior and subsequent thereto, infringed such copyright by giving public performances of such composition on defendant's premises, for the entertainment and amusement of the patrons attending said premises, for the purpose of profit and defendant threatens to continue such infringing performances.

11. The said wrongful acts of defendant have caused and are causing great injury to plaintiff, Twentieth Century, which damage cannot be accurately computed, and unless this Court restrains the defendant from the further

commission of said acts, said plaintiff will suffer irreparable injury, for all of which the said plaintiff is without any adequate remedy at law.

12. Both of the plaintiffs joined in this complaint have causes of action against the defendant which are properly joined in one action under Rule 20 of the Federal Rules of Civil Procedure, 28 U.S.C.

For a Second Cause of Action, Plaintiff Mary M. Bourne Alleges:

13. Realleges each and every allegation contained in Paragraphs "1", "3", "4", and "12" of the first cause of action.

14. The plaintiff, Mary M. Bourne, is the proprietor of the copyright in the musical composition "ME AND MY SHADOW".

15. Prior to May 10, 1927, Billy Rose, Al Jolson and Dave Dreyer, citizens of the United States, created and wrote an original musical composition entitled "ME AND MY SHADOW".

16. On May 10, 1927 and May 11, 1927, Irving Berlin Inc. as proprietor of the composition complied in all respects with Title 17, U.S.C., and secured the exclusive rights and privileges in and to the copyright of said composition, and received from the Register of Copyrights a certificate of registration identified as follows: "Entry: Class E, XXc., No. 664495".

17. Said copyright was renewed by due registration in the office of the Register of Copyrights, who thereupon

issued Certificate of Registration of a Claim to the Renewal of a Copyright in the names of Mrs. Erle Krasna, claiming as widow of Al Jolson, author of the music; Dave Dreyer, claiming as author of the music; and Billy Rose, claiming as the author of the words, dated and identified as follows: May 11, 1954; R 130511".

18. Since May 10, 1927, said composition has been printed and published in strict conformity with Title 17, U.S.C.

19. At the times of the acts of infringement hereinafter complained of, Mary M. Bourne was and still is the proprietor of the copyright in said composition.

20. A copy of Mary M. Bourne's copyrighted composition is hereto attached as Exhibit "B".

21. Defendant on March 11, 1972, and upon information and belief, at other times prior and subsequent thereto, infringed such copyright by giving public performances of such composition on defendant's premises, for the entertainment and amusement of the patrons attending said premises, for the purpose of profit and defendant threatens to continue such infringing performances.

22. The said wrongful acts of defendant have caused and are causing great injury to plaintiff, Mary M. Bourne, which damage cannot be accurately computed, and unless this Court restrains the defendant from the further commission of said acts said plaintiff will suffer irreparable injury, for all of which the said plaintiff is without any adequate remedy at law.

Appendix B

WHEREFORE, plaintiffs pray:

I. That defendant and all persons acting under the direction, control permission or authority of defendant be enjoined and restrained permanently from publicly performing the aforementioned compositions or any of them and from causing or permitting the said compositions to be publicly performed in defendant's said premises, or in any place owned, controlled or conducted by defendant, and from aiding or abetting the public performance of such compositions in any such place or otherwise.

II. That defendant be decreed to pay plaintiffs such damages as to the Court shall appear proper, but not less than Two Hundred and Fifty Dollars ($250.00) in each cause of action herein.

III. That defendant be decreed to pay the costs of this action and that a reasonable attorneys' fee be allowed to be ratably shared by plaintiffs as part of the costs.

IV. For such other and further relief as may be just and equitable.

Thorp, Reed & Armstrong
Attorneys for Plaintiffs
Office & P. O. Address
2900 Grant Building
Pittsburgh, Pennsylvania

By .....
(Member of said firm)

Exhibit A Annexed to Complaint

Twentieth Century's Copyrighted Composition

(See Opposite ☞)

From the 20th Century-Fox Technicolor Musical Billy Rose's DIAMOND HORSESHOE

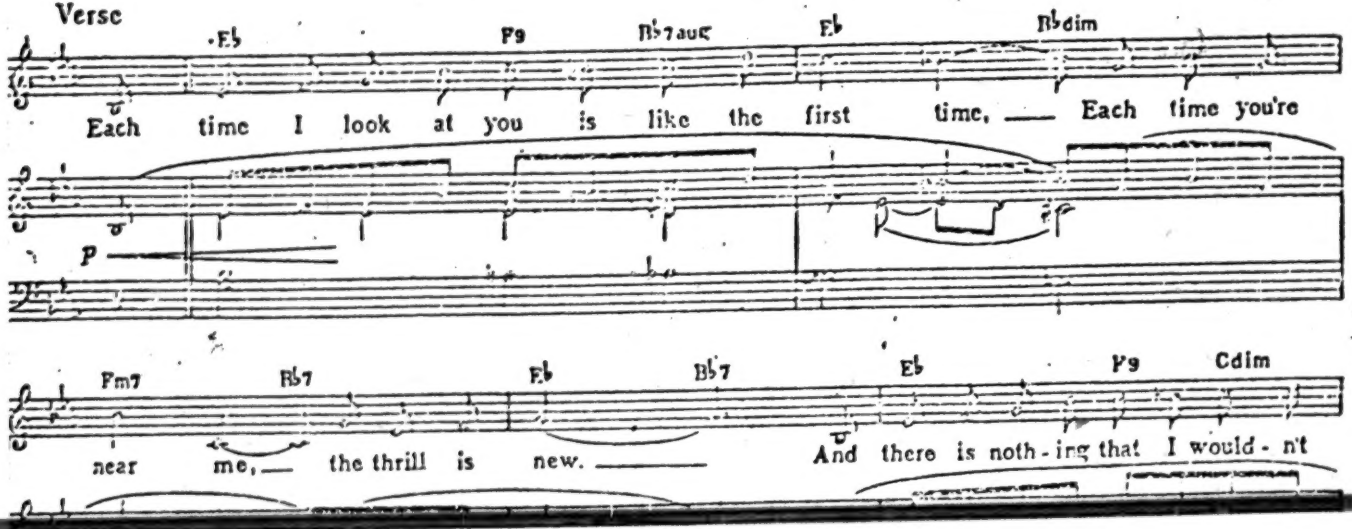
THE MORE I SEE YOU

Words by
MACK GORDON
A.S.C.A.P.

Music by
HARRY WARREN
A.S.C.A.P.

Andante

Verse



From the 20th Century-Fox Technicolor Musical Billy Rose's DIAMOND HORSESHOE

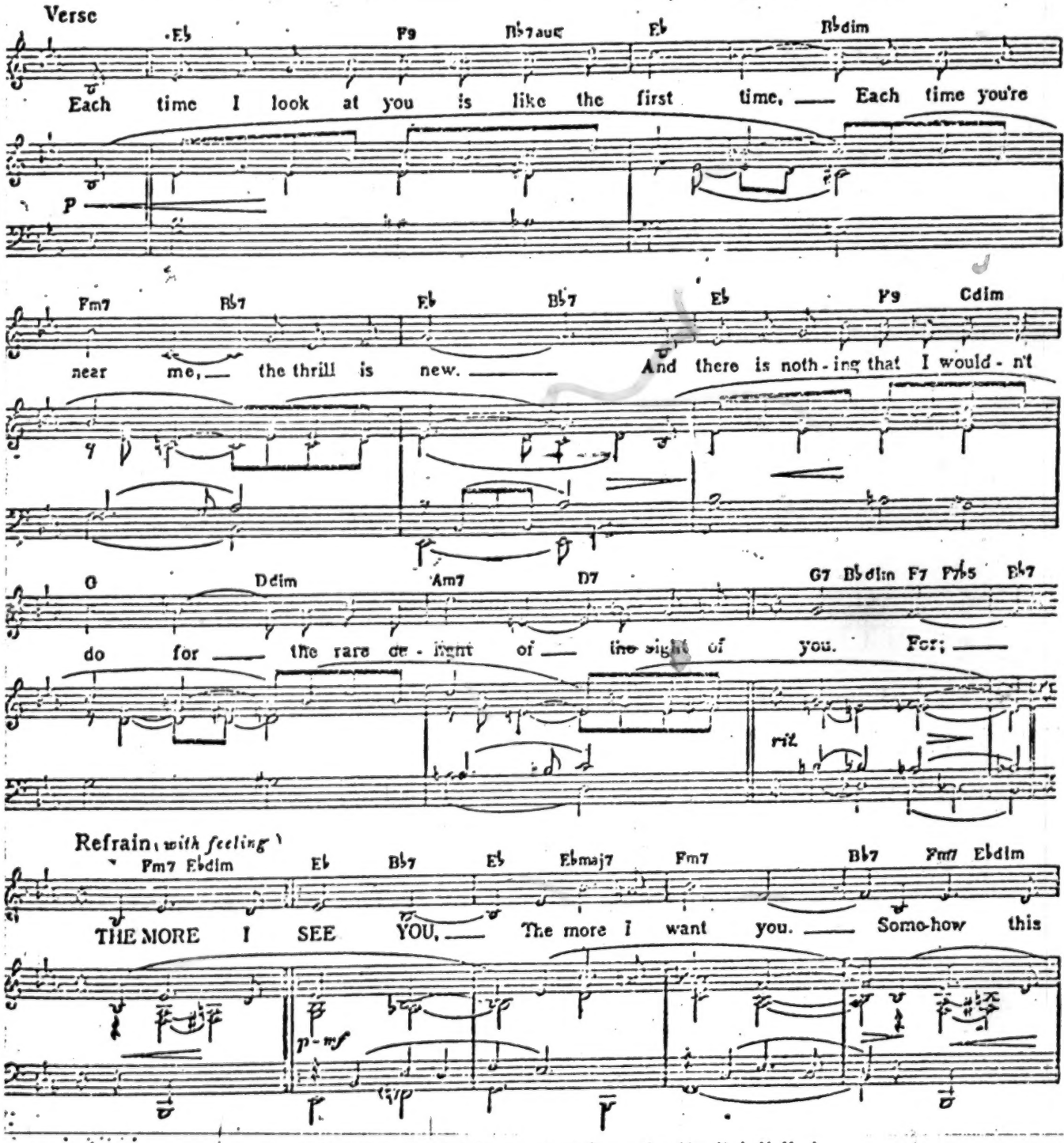
THE MORE I SEE YOU

Words by
MACK GORDON
a.s.c.a.p.

Music by
HARRY WARREN
a.s.c.a.p.

Andante

Verse



Refrain (*with feeling*)

Copyright 1945 by Twentieth Century Music Corporation, New York, N. Y.
Rights throughout the world controlled by BREGMAN, VOCCO and CONN, Inc., 1619 Broadway, New York 19, N. Y.
International Copyright Secured
Made in U.S.A.
All rights reserved including the right of public performance for profit

"The use of the lyrics with any other music or use of the music with any other lyrics or any arrangement or adaptation of this composition is expressly prohibited."

Exhibit "B"

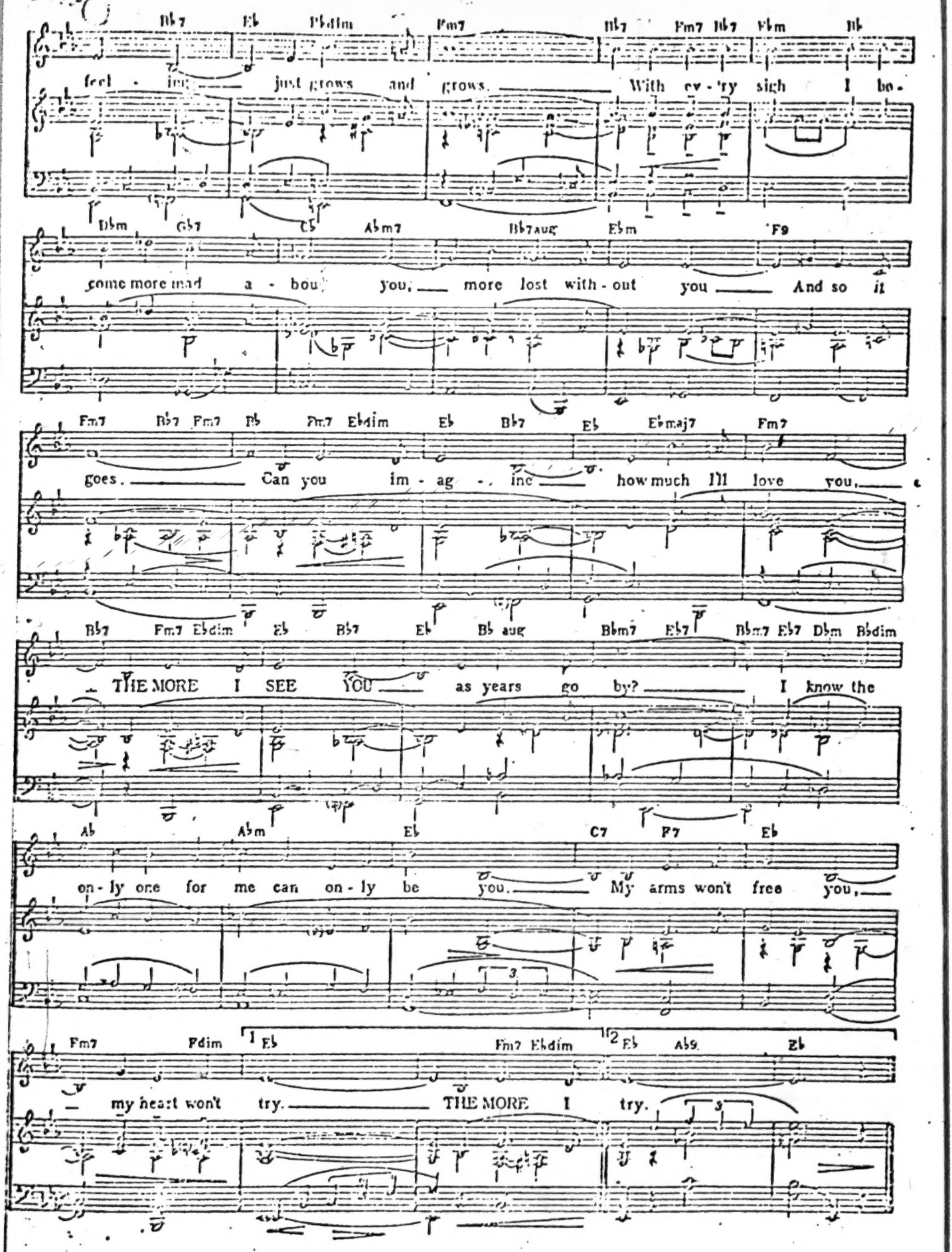

Bb7 Eb Ebdim Fm7 Bb7 Fm7 Bb7 Ebm Bb
feel - ing just grows and grows. With ev - 'ry sigh I be -
Dbm Gb7 Cb Abm7 Bb7aug Ebm F9
come more mad a - bou you, more lost with - out you And so it
Fm7 Bb7 Fm7 Eb Fm7 Ebdim Eb Bb7 Eb Ebmaj7 Fm7
goes. Can you im - ag - ine how much I'll love you,
Bb7 Fm7 Ebdim Eb Bb7 Eb Bb aug Bbm7 Eb7 Bbm7 Eb7 Dbm Bbdim
THE MORE I SEE YOU as years go by? I know the
Ab Abm Eb C7 F7 Eb
on - ly one for me can on - ly be you. My arms won't free you,
Fm7 Fdim 1 Eb Fm7 Ebdim 2 Eb Ab9 Eb
my heart won't try. THE MORE I try.

Exhibit B Annexed to Complaint

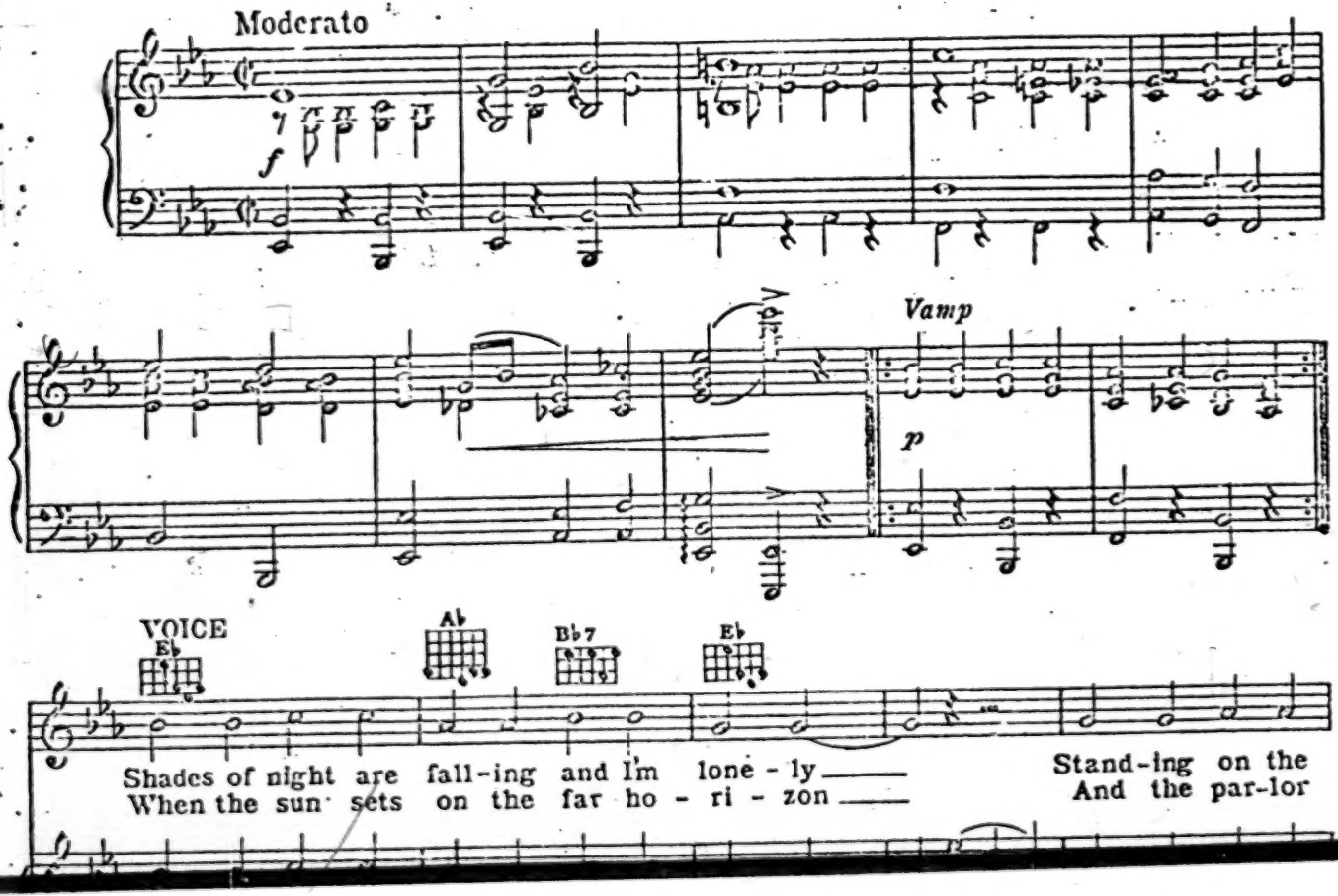
Mary M. Bourne's Copyrighted Composition

(See Opposite ☞)

Me And My Shadow

Words by
BILLY ROSE

Music by
AL JOLSON and
DAVE DREYER



Me And My Shadow

Words by
BILLY ROSE

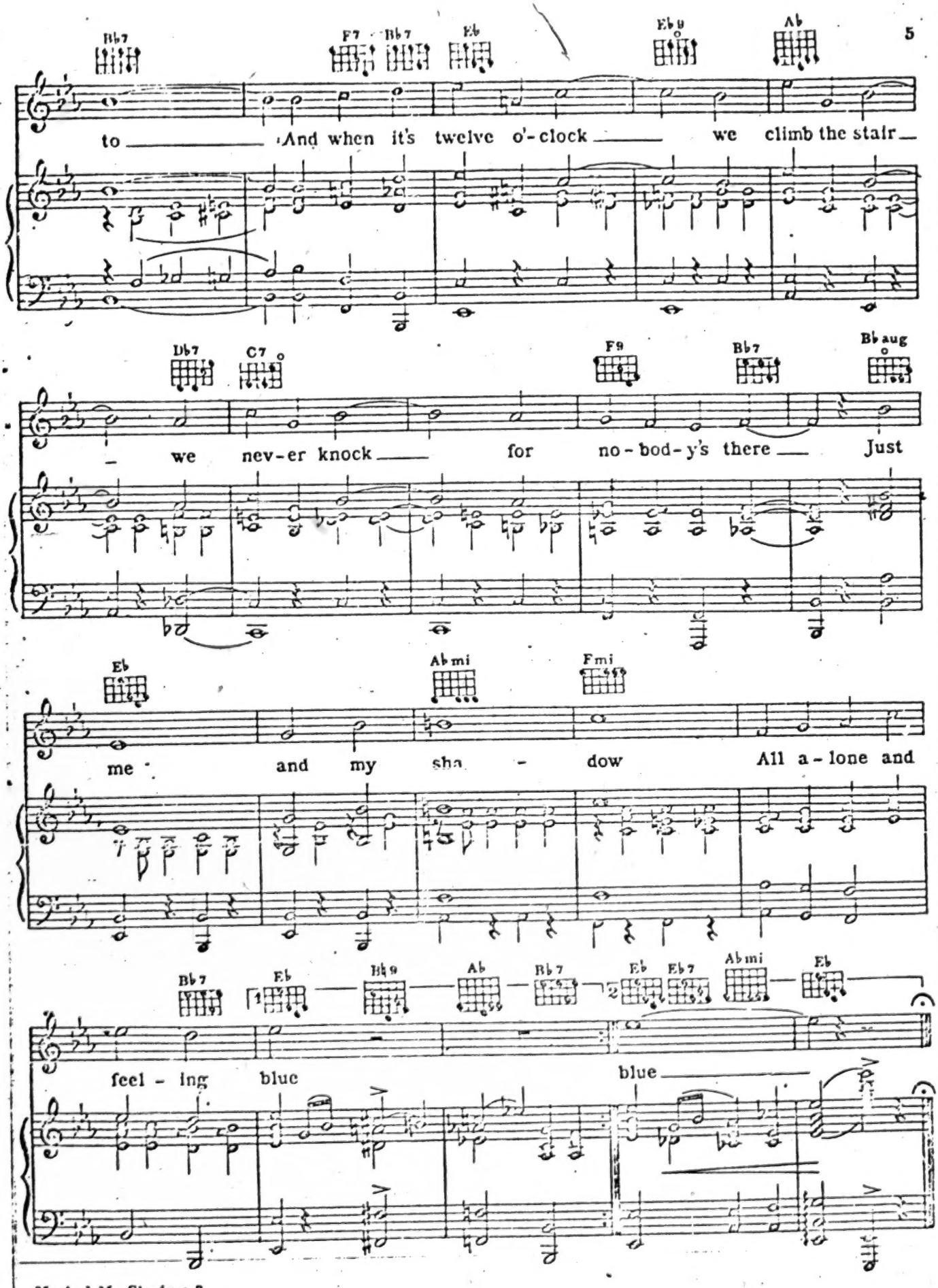
Music by
AL JOLSON and
DAVE DREYER

*)Symbols for Guitar, Chords for Ukulele and Banjo

Copyright 1927 BOURNE, INC.
Original proprietor Irving Berlin Inc., name changed to BOURNE, INC.
All Rights Reserved Including the Right of Public Performance for Profit
International Copyright Secured Made in U.S.A.
Copyright Renewed

EXHIBIT "B"

Pass me one by one
Put their slip-pers on
Guess I'll wind up like I al-ways do, with on - ly
They're all set but we're still on the go, so lone-ly
CHORUS
Me and my sha - dow
p-f
stroll-ing down the av - en - ue
Me
and my sha - dow
not a soul to tell our trou-bles


Bb7
F7
Bb7
Eb
Eb9
Ab
to
And when it's twelve o'-clock
we climb the stair
Db7
C7
F9
Bb7
Bbaug
we nev-er knock
for no-bod-y's there
Just
Eb
Abmi
Fmi
me
and my sha - dow
All a-lone and
Bb7
Eb
Bb9
Ab
Bb7
Eb
Eb7
Abmi
Eb
feel - ing blue
blue

Appendix C

Answer Filed in the United States District Court for the Western District of Pennsylvania

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF PENNSYLVANIA

[TITLE OMITTED IN PRINTING]

1. Denied. This action is not within the scope of Title 17, U.S.C.A.

2. Admitted.

3. Denied. Does not operate and maintain a business for public entertainment, or amusement.

4. Denied. There was no public performance of entertainment for profit.

5. Admitted.

6. Admitted.

7. Admitted.

8. Denied. There were no acts of infringement.

9. Admitted.

10. Denied. Copyright laws were not intended and do not include the playing of a duly licensed radio broadcast.

11. Denied. No injury or damages were sustained by plaintiff and will not therefore suffer irreparable injury in the future.

12. Admitted.

13. Restate answers to allegations in paragraphs "1", "3", "4", and "12".

14. Admitted.

15. Admitted.

16. Admitted.

17. Admitted.

18. Admitted.

19. Denied. There has been no infringement of plaintiff's protected rights under the copyright laws.

20. Admitted.

21. Denied. Defendant at no time infringed upon rights granted to the plaintiff under the copyright laws.

22. Denied. The plaintiff suffered no injury.

WHEREFORE, defendant prays that this Honorable Court dismiss this action, because of plaintiff's failure to state a cause of action for which relief can be granted under the copyrighted laws Title 17, U.S.C.A.

W. E. Frazier, Jr.
Attorney for Defendant
Suite 210—Carlton House
550 Grant Street
Pittsburgh, Pa. 15219

Appendix D

Notation to the Place in the Certiorari Petition Where Are Printed the Decisions Below and the Judgment Sought to Be Reviewed

The opinion of the United States Court of Appeals for the Third Circuit is reprinted in the petition for writ of certiorari at Appendix A.

The opinion of the United States District Court for the Western District of Pennsylvania is reprinted in the petition for writ of certiorari at Appendix B.

The judgment of the United States Court of Appeals for the Third Circuit sought to be reviewed is reprinted in the petition for writ of certiorari at Appendix C.

Appendix E

Transcript of the Proceedings at Trial in the United States District Court for the Western District of Pennsylvania

(Pages 17A to 67A)

(1)

Record of Proceedings at the Trial.

IN THE

DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

20TH CENTURY MUSIC CORPORATION,

Plaintiff,

v.

GEORGE AIKEN,

Defendant.

72-440 Civil Action

HON. JOSEPH F. WEIS, JR., J.
Pittsburgh, Pennsylvania
10:00 o'clock a.m.
Thursday
February 8, 1973

For the Plaintiff:

WILLIAM M. WYCOFF, JR., Esquire

For the Defendant:

WILLIS E. FRAZIER, JR., Esquire

Mr. Wycoff: Your Honor, before we begin I would like to introduce to you Mr. Corman, who is a member of the Bar of the Southern District of New York and will be at counsel table with me. Also sits at counsel table, Mr.

Finkelstein, general counsel for ASCAP and who will be a witness.

The Court: Thank you, Mr. Wycoff.

Mr. Frazier: Is Mr. Corman going to proceed here with you, are you going to proceed with the case yourself?

Mr. Wycoff: I am proceeding. Preliminarily, before we start, your Honor, if you recall when we met in your (2) office for a pre-trial conference a briefing schedule was established that the briefs were to be due on January 31, Mr. Finkelstein has been out of the country and I called your Clerk and asked if we could have an extension for two days so that he could review the brief and this was agreed to. We then delivered our briefs to Mr. Frazier. However, we did not receive a brief from him until three days after that and it is very clear that his brief is a reply brief to ours, your Honor. I don't believe it reflects the spirit of what we agreed to that we would simultaneously file briefs so I hope that the Court will look at these briefs in that light.

The Court: Whatever the law is, I don't care who files it first.

Mr. Wycoff: Also, your Honor, on Page 7 of Mr. Frazier's brief at the bottom of that page he gives a quote which from the way that it is set up in his brief it would appear that that is a direct quote from Justice Court in the footnote.

The Court: I was going to ask you about that, too, I was curious about that.

Mr. Wycoff: Footnote 2, I believe it is our contention that it is wrong and we will have evidence on that.

The Court: I would be interested in hearing evidence on that point. I wondered where Mr. Nimmer got that (3) information.

Mr. Frazier: Your Honor, in response to Mr. Wycoff's stating he received a brief I received his brief Monday morning and he received mine, sir.

Dennis Wayne Cercone—For Plaintiff—Direct.

The Court: You are both all right on your briefs, I am not concerned about that.

Mr. Frazier: Call Mr. Dennis Cercone, please?

DENNIS WAYNE CERCONE, called and sworn as a witness on behalf of the plaintiff, testified as follows:

Mr. Wycoff: Your Honor, before we begin Mr. Cercone's examination we did arrive at certain stipulations in your office which I would like to make part of the record.

The Court: I think that is very appropriate.

Mr. Wycoff: Mr. Frazier I believe, if you remember, that we did stipulate that the plaintiff, 20th Century Music Corporation, is the copyright proprietor of the song "The More I See You" and Mary Bourne is the copyright owner of "Me and My Shadow", it is a music copy.

Mr. Frazier: I stipulate that.

Mr. Wycoff: We also stipulate that the plaintiff owns and operates "George Aiken's Chicken" which is located at 7th and Liberty and Smithfield Streets in the City of (4) Pittsburgh. We also stipulate that on March 11, 1972, the two musical compositions involved in this action were performed at that establishment over a radio and three loudspeakers.

Mr. Frazier: Your Honor, I think we cited it occurred and you it was performed.

The Court: Three compositions were offered.

Mr. Wycoff: Over a radio and over three loudspeakers.

Mr. Frazier: I don't believe I stipulated that. I stipulated that Mr. Aiken played at his establishment the radio and possibly the tunes were played. I won't argue, I concede that.

The Court: What radio station?

Mr. Wycoff: We agreed that it was Radio Station WJKF-FM and that that radio station was licensed to perform those compositions and you asked that we have a copy of the license here and we do have a copy of that, your Honor.

The Court: Very well.

PLAINTIFF'S CASE IN CHIEF:

Direct Examination by Mr. Wycoff:

Q. Will you state your name, please? A. Dennis Cercone.

Q. Where do you live, Mr. Cercone? (5) A. 419—21st Street, Aliquippa, Pennsylvania.

Q. Are you presently employed? A. Yes, I am.

Q. Where? A. I am employed at the Ivy School of Professional Arts.

Q. Were you engaged on March 11, 1972 by ASCAP to perform an inspection? A. Yes, I was.

Q. What were the terms of your being engaged by them, what were you to do? A. I was to go to George Aiken's restaurant and perform an inspection of the premises which included entering the premises and in a written form describe the exterior, the interior and also the music policy and after this was performed to speak to either the manager or the owner.

Q. And while you were in the establishment did you take any notes? A. Yes, I did, I took written notes of both the description of the interior, the exterior and also I wrote down the musical compositions played that afternoon.

Q. And did you make any sketches of the establishment? A. Yes, I also made a diagram of the building and the interior.

Q. While you were in the establishment did you see

members of the Public enter and purchase food? A. Yes, I did.

(6) Q. And did some of those people sit down and eat the food within the establishment? A. Yes.

Q. During any one time how many people were in or out of the establishment? A. Through the afternoon the minimum amount of people that were in the place at one time was six and I believe the most that were in the restaurant at one time were eight.

Q. And how many employees were in the store? A. As I remember, I believe there were three.

Q. And where were they physically located? A. The majority of the time behind the counter.

Q. I am handing you a document and could you identify what this document is, please (hands paper to witness)? A. Yes, this is the notes that I took on that afternoon and also the sketch of the restaurant.

Mr. Wycoff: I ask that this be marked plaintiff's Exhibit 1. I offer into evidence Plaintiff's Exhibit 1 which is Mr. Cercone's notes and the sketch he made that afternoon.

The Court: Very well.

(Whereupon, said notes and sketch were admitted in evidence as Plaintiff's Exhibit No. 1.)

(7) By Mr. Wycoff:

Q. Mr. Cercone, on this sketch does it show the placement of the three speakers in the establishment? A. Yes, it does.

Q. And would you describe to the Court, please, where all three of those speakers were located? A. I located the three speakers on the ceiling which were over the dining area, in other words, where most of the people were seated.

Dennis Wayne Cercone—For Plaintiff—Cross.

Q. And how many could sit in that dining area? A. I think between 38 and 40, as I recall.

Q. And all three speakers were out in that area? A. Yes, they were.

Q. And you did hear musical compositions performed? A. Yes, I did.

Q. And you heard the two compositions that were involved in this lawsuit performed? A. Yes, I did.

Mr. Wycoff: I have nothing further of this witness.

Cross Examination by Mr. Frazier:

Q. Dennis, what hours were you in there? A. I was in George Aiken's roughly an hour and twenty minutes between four and five o'clock, prior to four o'clock and I (8) think ten after five, as I recall.

Q. At that time you say the maximum patrons were eight? A. At one time in the restaurant, yes.

Q. And at all times there were patrons in the restaurant? A. As I recall, yes.

Q. You say at least six? A. Yes.

Q. Did you make a note of that as to the accuracy? A. Yes, I did.

Q. What time were the six patrons in there? A. I don't understand your question.

Q. At what time did you observe the minimum of six patrons? A. At several different times throughout the afternoon, throughout the hour we were there in the afternoon.

Q. Do you have any notes to that effect or is this just your recollection? A. I recorded at one time there were at least six people.

Q. Do you have the records here in Court with you

today, sir? A. Yes, I do. I have it recorded that there were six people in the restaurant at one time.

Q. At what time? A. I have no specific time marked as to when there were exactly six people in the restaurant.

Q. And you are testifying that the minimum at all times was at least six persons? (9) A. Yes.

Q. Patrons in the restaurant? A. Yes.

Q. And a maximum of eight? A. At one time, yes.

Q. So at all times from the hours of a quarter to five or a little after five, five minutes after five at all times there were definitely six to eight people? A. Yes.

Q. It varied, two people in an hour and fifteen minutes, you say? A. There was a constant flow of people in and out of the restaurant, between six and eight people were there at that time.

Q. There was such a few people, did you time by any chance the time that they remained in the restaurant? A. No, I did not.

Q. Do you have any art background or scientific background as to education?

Mr. Wycoff: Your Honor, I object to that question.

Mr. Frazier: I am trying to qualify him. He presented a sketch here in evidence. I would like to qualify him in evidence.

The Court: The case, as I understand it, it is 99 percent a question of law. I don't want to get held up on (10) qualifications.

Mr. Wycoff: Your Honor, I don't think his qualifications are really relevant at this point.

By Mr. Frazier:

Q. Just one more question, your Honor. With regards to performance, do you understand what I mean by per-

formance? A. You are talking in terms of musical composition.

Q. You said you heard a radio played or you heard it performed? A. I said that I had heard musical compositions performed.

Q. Well, can you distinguish between performed and played over the radio? A. No, I cannot.

Mr. Frazier: There are no more questions.

Mr. Wycoff: You may step down, Mr. Cercone, thank you.

(Witness excused.)

Mr. Wycoff: Mr. Finkelstein?

Mr. Frazier: Your Honor, I would just like to strike the testimony as to performance as a conclusion of law.

The Court: The critical thing is that he heard it and the number of people.

Mr. Wycoff: That is fine, your Honor.

---

(11) HERMAN FINKELSTEIN, called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. Wycoff:

Q. Would you state your name, please? A. Herman Finkelstein.

Q. And where do you live, Mr. Finkelstein? A. Sellersville, Pennsylvania.

Q. And what is your occupation? A. I am a lawyer.

Q. And you are the general counsel of ASCAP? A. I am.

Q. Would you describe briefly, please, your employment history with ASCAP and your involvement?

Mr. Frazier: If it please the Court, I will stipulate as to the qualifications.

Mr. Wycoff: Your Honor, then if we could submit a short resume of Mr. Finkelstein's qualifications in this field (hands papers to defendant's counsel.)

The Court: Does Mr. Frazier care to see it?

Mr. Frazier: I will stipulate as to his qualifications.

Mr. Wycoff: You will accept that as a statement of qualifications?

The Court: Very well, thank you, Mr. Frazier.

(12) By Mr. Wycoff:

Q. Mr. Finkelstein, what is ASCAP? A. ASCAP is an unincorporated membership association consisting of the people who compose music or write the lyrics for musical works and their publishers. It is, in effect, a cooperative, you have the publishers, on the one hand, and the writers on the other. The Board of Directors is composed of one-half writers elected by the writers and one-half publishers elected by the publishers and all royalties that are collected are distributed equally between the writers and publishers, one-half to the writers and one-half to the publishers.

Q. What are the rights that the members grant to the Society?

Mr. Frazier: I will object, your Honor, at this particular time ASCAP is not a party to this lawsuit and we stipulated as to his qualifications. I am not concerned with an issue here as to the licensing agreements. I will stipulate they were licensed but I can't afford any information as to the particular case.

The Court: Objection overruled.

By Mr. Wycoff:

Q. Mr. Finkelstein, what rights do the members grant to the Society? A. The members grant to the Society a non-exclusive right to (13) license non-dramatic public performances of their works for profit. The members reserve all other rights, they reserve dramatic rights, for example, and the right to license non-dramatic performances on their own.

Q. Is ASCAP authorized to bring infringement actions for its members? A. Yes, it is.

Q. And what is that authorization? A. Well, the members in the membership agreement empower the Society to bring suits for infringement occurring by means of non-dramatic public performances, in the names of the members or name of the Society.

Q. And is that one of your functions as general counsel? A. Yes, it is, no suit is brought that isn't approved by me or a lawyer on my staff that I delegate to review it.

Q. And are the plaintiffs in this case members of the Society? A. Yes, they are.

Q. What are your duties as the general counsel of ASCAP? A. I am the legal officer in charge of all legal matters pertaining to the Society. That would involve lawsuits for infringements brought by the Society, it would involve defending suits brought against the Society. For example, being as large an organization as ASCAP is, it naturally had antitrust problems with the Department of Justice and I represented ASCAP in those matters. What is called the (14) Amended Final Judgment entered in 1950 was a consent decree in which the Society agreed that all licenses will be issued at reasonable rates and will be applied in a fair and non-discriminatory manner. Now,

I have an obligation to see that that decree is lived up to and so I review all rates—that is determined by the business end of the Society—before they are presented to the Board of Directors for approval and I have a Society economist review periodically the application of the licensing structure to be sure that the provision that requires the rates being fair and they be uniformly applied is enforced.

Q. Under the consent decree, Mr. Finkelstein, if the licensee is dissatisfied with the rates, what are his rights? A. Under Section 9 of that judgment any user who questions the rates quoted by the Society has the right to apply to the Federal Court for a review of the rates and a determination of a fair rate. The mere application for a license by the user under the decree gives him the license for a 60-day period and if the rate can't be worked out during that 60 days then either the user or ASCAP can apply to the Court for the determination of a fair rate.

The Court: Does the decree limit it to one particular court, Mr. Finkelstein?

(15) A. Yes, sir, the United States District Court for the Southern District of New York in which the decree was entered.

By Mr. Wycoff:

Q. Mr. Finkelstein, at my request did you obtain a copy of the license with Radio Station WJKF-FM? A. Yes, I did.

Q. Could you identify this document, please (hands paper to witness)? A. You have handed me two documents, one the agreement between the Society and Station WJKF-FM, Incorporated, for an FM station having those call letters dated September 12, 1967, expiring on February

29, 1972. And an extension of that agreement dated March 2, 1972, providing for a continuance subject to cancellation on three months' notice.

Q. Is that the original license? A. Those are the original licenses and extension.

Mr. Wycoff: I ask that it be marked Exhibit 2 and offered in evidence. Your Honor, could we substitute a Xerox copy for this and offer it into evidence, do you have any objection?

Q. Mr. Finkelstein, could you please tell us your involvement with the preesnt form of radio license? (16) A. Well, the present form of radio license, the form you have before you, was worked out with the broadcasting industry in a series of conferences in 1941 after the ASCAP music had been off the air for a year because of a dispute with the broadcasting industry. The National Association of Broadcasters and the radio networks in those days appointed a committee to negotiate with ASCAP and the agreement that was ultimately worked out was worked out between me and Robert Myers, who was at that time general counsel for the National Broadcasting Company, that was in 1941.

Q. Mr. Finkelstein, in that agreement in the first full paragraph, fourth line from the bottom of that paragraph, there is a limitation clause which states, "Nothing herein contained shall be construed as authorizing licensees to grant to others any right to reproduce or to perform publicly for profit by any means, method or process whatsoever any of the musical compositions licensed hereunder or as authorizing any receiver of any radio broadcast to perform publicly or reproduce the same for profit by any means, method or process whatsoever." Why is that limitation in this license agreement? A. Well, the Society at

that time was licensing on its own the reception of radio broadcasts in public places where there were loudspeakers. And the arrangement worked out with the broadcasting industry was to apply only for the (17) point of broadcast, that is what they were obtained for. Any place picking it up publicly was to make its own arrangements for payment with ASCAP. The only public place apart from the broadcast, itself, covered by the agreement was a studio from which the broadcast emanated and where no admission fee was charged unless if there were an admission fee charged those admission fees went to charity and we agreed under those circumstances that would be included in this license.

Q. What is ASCAP's policy regarding the broadcasting of radio programs over speakers in a commercial establishment?

Mr. Frazier: Pardon me, I will object to that question, your Honor, I can't see it has any particular indication as to ASCAP. This action was brought by 20th Century and Mary Bourne, I am not concerned what ASCAP's procedure is.

Mr. Wycoff: I think we have laid a foundation, your Honor, that these two plaintiffs are members of ASCAP and ASCAP their licensee.

Mr. Frazier: I am not concerned about their relationship with other divisions, I am concerned about their contract rights with this particular division.

The Court: Objection overruled.

By Mr. Wycoff:

Q. The question, Mr. Finkelstein, what is ASCAP's policy (18) regarding the broadcasting of a radio program over loudspeakers in a commercial establishment such as George Aiken's here? A. The Society has this policy that if the establishment has nothing more than a home receiving set the Society makes no charge for that performance

but if loudspeakers are employed then that gets into the area where the Society has a very substantial licensing operation. For example in this licensing of Muzak and similar organizations that is entirely on the basis of loudspeakers; and about over 75,000 establishments are licensed on that basis, and that involves revenue of over $2,100,000.00 a year to the Society for its members. If the Society were not to enforce its right with respect to loudspeakers Muzak would stop paying. There are over 5,000 places that the Society licenses directly and, by the way, the license fee for this kind of use is the lowest or minimum license fee for the Society has, $5.00 a month or $60.00 a year. Now, that has been a part of the Society's operation as long as I remember. Certainly it was in 1941 and has been since that time.

Q. All right, now, are ASCAP's policies as to charging the license fee for the broadcasting over loudspeakers applied uniformly throughout the United States? A. Yes, the policy is applied uniformly.

Q. And is it your obligation as general counsel to see that (19) this is so? A. It is.

Q. And is it? A. I have reviewed it and it is reviewed periodically and the policy is applied and is applied uniformly.

Q. All right, and do you license throughout the country establishments such as George Aiken's Chicken? A. The Society does.

Q. Do you license in the Pittsburgh area such establishments? A. Yes, sir.

Q. How many establishments have you licensed that use radio over loudspeakers? A. Directly a little over 5,100.

Q. And what is the value of these licenses? A. A little over $246,000.00.

Q. And I believe you did testify to that, I am sorry if I am being redundant but how long has the Society been

licensing such establishments for such performances? A. It came to my attention in 1941 in working out the radio agreement. I don't know how long it was in effect before that but it has been since that time down to this date.

Q. And have you licensed large chain stores for the broadcasting of music? A. Oh, yes, definitely.

Q. Are there any current proposals regarding the change of (20) copyright laws which would affect what you have talked about today before Congress? A. Yes, there was a bill which passed the House. Copyright revision, by the way, has been the subject before Congress for quite some time because the copyright law was enacted in 1909. Congress made an appropriation in 1956 for a study of a revision of the law and a number of bills have been introduced. The first one to pass the House was passed in 1967 which is H.R. 2512 and Section 110, Subdivision 5 of that bill provides that there shall be liability for performances, that there shall be an exemption of places that use just an ordinary home receiving set but there will be liability if they make a further use. We felt that, both ASCAP and BMI—

Mr. Frazier: Pardon me, I object to this testimony as to the bill unless he has a copy of the bill.

A. I do have a copy.

Mr. Frazier: Would you present it in evidence?

A. Yes, if you would hand me an excerpt at least from HR 2512 and then if I can have that folder that you have there. Hand me the papers that were under there, too, because I think they have everything that may be pertinent here.

Mr. Frazier: Your Honor, I would like to object to his testimony that this wasn't in his particular

pre-trial (21) brief and I wasn't aware to look into this and I object to the testimony.

The Court: Objection overruled.

The Witness: There is a copyright bill on the desk I think, I am not sure of the number at the moment. That is it, thank you.

By Mr. Wycoff:

Q. Well, Mr. Finkelstein, what you were testifying about is contained in that draft of the new copyright bill? A. Yes, I have the form of the section, HR 2512 and Section 110.

Q. And that has been passed by the House? A. Yes, that was passed by the House in 1967.

Q. And is presently before the Senate? A. Not that bill because at that time it was adjourned but corresponding bills have been introduced and have been before the Senate Committee since that time. They all contain that provision.

Q. And specifically it would write in to statutory law that the broadcasts for radio over loudspeakers would require the users to get a license? A. Well, I would rather refer to the provision, itself, Section 110(5) provides this, you might check me on that, "Notwithstanding the provisions of Section 106 the following are not infringements of copyrights." Then you (22) would have to go back to Section 106 that provides the exclusive rights and on the copyrighted work subject to 107 to 116 the owner of a copyright under this title has the exclusive right to do and authorize any of the following. And then you get down to subdivision 4 which says:

"(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures

and other audio-visual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic and choreographic works, pantomines, and pictorial, graphic, or sculptural works, to display the copyrighted work publicly."

Mr. Frazier: (Interposing) Your Honor, I would like to object again. This is very hard to follow, this line of testimony. Wait a minute, I think you have submitted this in your trial brief.

The Court: Objection overruled, I want to hear the background of the problem as to what I think is all relevant. Objection overruled.

A. (Continuing) Then, your Honor, Section 110, Subdivision 5 carves out an exception. It reads this way, "Notwithstanding the provisions of Section 106 the following are not infringements of copyrights" and we get down to Subdivision 5.

Mr. Frazier: Your Honor, if he is going to read this I would like to see what the infringements are, what are not infringements are to clarify this. If he is testifying (23) to the whole thing I want a complete unbiased opinion. Could you read out the non-infringements?

A. Yes.

By Mr. Wycoff:

Q. I guess you would read Paragraphs 1, 2, 3, 4 and 5, if you would, please. A. Section 110 has a caption, "Limitations on Exclusive Rights. Exemption of certain performances and displays." By the way, I am reading from HR 4347 which I am quite sure is identical with HR 2512.

We had bter just be sure, I don't have HR 2512 before me at the roment.

Q. I beleve I just handed that to the Judge, is this what you re referring to? A. I would just like to check and see wether it is the same as the one I have before me, which s HR 4347.

M. Frazier: Your Honor, I would still like an objetion, I am surprised at this form of testimony. I ar not competent to countermand and make my objetions and I definitely feel that this should have been in his trial memorandum.

The Court: Objection overruled, it is a question of law, Mr. Frazier.

M. Wycoff: The Judge did ask specific questions at our pre-trial conference.

(2) Mr. Frazier: I thought all we were concerned about are the license and I stipulated to that effec.

By Mr. Wycoff:

Q. Woul you proceed, please? A. I am reading from HR2512. It says, "Notwithstanding the provisions of section 106, the following are not infringements of copyright:

(1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audio-visual work, he performance is given by means of a copy that was not lawfully made under this title and that the person responsible for the performance knew or had reason to believe was not lawfully made;

(2) performance of a nondramatic literary or musical work, or display of a work, by or in the course of a transmission by a governmental body or other nonprofit organization." Now, I am going to skip the rest of that provision because I don't think that is involved here—after "governmental body or nonprofit organization," I will go down to No. 3:

"(3) performance of a nondramatic literary or musical work or of a dramatico—musical work of a religious nature, or display of a work, in the course of services at a place of (25) worship or other religious assembly."

"(4) performance of nondramatic literary or musical work, otherwise than in a transmission to the public, without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers, if:

(A) there is no direct or indirect admission charge, or

(B) the proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for educational, religious, or charitable purposes and not for private financial gain, except where the copyright owner has served notice of his objections to the performance under the following conditions"

And I think we can skip those conditions because that doesn't apply here. Then we get down to the fifth and last subdivision of Section 110.

"(5) communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless . . ."

The Court: Now, in the bill that you are reading does it say single radio receiving apparatus?

A. This bill I have here has single receiving apparatus.

The Court: You put the word "radio" in.

(26) A. Oh, did I? I am sorry, continuing to read from "a single receiving apparatus of a kind commonly used in private homes unless"—

"(A) a direct charge is made to see or hear the transmission." That, of course, is not our case or,

"(B) the transmission thus received . . ." [received on that single receiving apparatus] is further transmitted to the public. And of course here that was further transmitted to the public by these loudspeakers.

By Mr. Wycoff:

Q. Mr. Finkelstein, does that provision, Sub-Section 5, conform to the existing ASCAP policy? A. Yes, it does.

The Court: How does that fit in with the [illegible] that the Supreme Court had on the TV?

A. Park case, your Honor?

The Court: Yes, would there be any direct conflict with that?

A. Well, of course, the Fortnightly case involved cable television and cable television is governed by the section of 111 of HR 2512.

The Court: This does not purport to cover television communication then, cable television in it does not, that is, cable television as distinguished from television broadcasts which are just radio broadcasts? Section 25 (27) applies to the customer TV reception but not to cable.

A. Not for cable, that is right. There is a separate section on that, Section 111 did provide for cable television and on the House floor that was taken out of the bill but Section 111 was restored with changes in the bill before the Senate. As the bill passed the House cable television would have absolute liability but it is understood they would work that out.

Mr. Frazier: Pardon me one second, what is the date of this particular bill?

A. The one that I am reading from is dated February 4, introduced February 4, 1965, and reported out October 12, 1966.

Mr. Frazier: It is before the Fortnightly decision?

A. The one his Honor has before him, HR 2512, is 1967.

Mr. Frazier: Still before the Fortnightly decision?

A. Oh, yes, and there have been bills since the Fortnightly decision but the one that passed the House—

Mr. Frazier: Do you have those?

A. I believe I do.

By Mr. Wycoff:

Q. Well, on cross examination we will get them at that time. Mr. Finkelstein, I am not sure that you are familiar with the Footnote 204 that appears in Nimmer, that is reproduced (28) in the defendant's trial brief, I would ask you if you would read that to yourself for a moment, please (hands paper to witness)? A. (Witness reads silently). I have that.

Q. Will you state to the Court, please, whether that footnote reflects what, in fact, is the true practice of ASCAP? A. It does not. I think I can see how Mr. Nimmer went wrong but it does not reflect the practice of ASCAP or as I use it.

Q. But as to ASCAP would you state once again what the practice of ASCAP is? A. The practice of ASCAP is to enforce the rights under the copyright law wherever there are loud speakers but not to enforce those rights where the reception is by means of an ordinary home set and the way that came about was that there was a small amount of Momma and Poppa places, stores where they had an ordinary home receiving set to keep them occupied during the day and the Society felt, the Society has adopted a policy of not enforcing the rights even though they existed against that kind of use of the musical works in the repertory of the Society. However, at the point of the installation of loud speakers that was the kind of use that the Society was enforcing generally. Now, even with not applying this policy to receiving sets the Society had many complaints from such organizations as (29) Muzak which contended that if the Society didn't grant this exception that Muzak would be able to sell these people the Muzak services because the Society's rate has been the minimum rate, is $60.00 a year. If Muzak installed the Muzak operation they would have that $60.00 to work with right away but the Society felt that notwith-

standing the complaints of the Muzak people that in enforcing the rights of its members it was reasonable not to insist on payment by the Momma and Poppa type of operation where they just used the home set.

Q. Now, Mr. Finkelstein, as general counsel for ASCAP do you have an opinion as to whether the Fortnightly case did overrule Bucks with respect to the licensing of an operation such as George Aiken's Chicken which does broadcast radio over or through loudspeakers, three loudspeakers?

Mr. Frazier: I object to that as a conclusion of law and strictly presented here by the evidence to present this side of the picture and I don't attach much relevancy to it.

The Court: Well, it is his opinion, of course. I will permit it, it is still my decision.

A. In Fortnightly the Supreme Court had before it a new industry that wasn't in existence at the time of Buck and Jewell-LaSalle and at that time the question was whether the Doctrine of Buck and Jewell-LaSalle would be extended to (30) this new industry which as counsel for the cable television people pointed out in that case would involve this industry in millions of dollars of copyright infringement liability and might choke off this industry before it got moving. The Supreme Court took that into consideration as the opinion states and decided that it would limit Buck and Jewell-LaSalle to its facts, I suppose somewhat as in the Flood baseball case that went before the Supreme Court recently.

The Court: Well, they said that the remedy in Buck and Jewell-LaSalle was the tax, just what did they mean by that? The hotel with the radio being played in each room by one of these little knobs?

Mr. Wycoff: I think the Court noted that it was also in the dining rooms and Public hotel.

A. I think, basically, the question certified to the Supreme Court in the case of Buck and Jewell-LaSalle was whether there was a performance, both at the radio station where the performance was initiated and at the hotel. It was contended that there could be only one performance and that that performance occurred, if there was a performance, that that performance occurred at the point of the broadcast initiation. Now, in the Jewell-LaSalle case the broadcasting station was not licensed and the hotel was not licensed, just to get all the differences, but the Court held (31) that that was a performance both at the point of the radio origination and at the hotel. Now, the Supreme Court in Fortnightly held that what the cable television people did, what the Fortnightly people did, was not a performance; that when a person in his home turns on and activates a radio, a television set, that was not a performance and that what the cable television people did in enabling the performance to get to the home was more like what the person at home did than it was like what the broadcaster did and broadcasting had been held, of course, to be a performance. Now, the question before the Court was on what side of the line should they put cable television and they were confronted with Buck and Jewell-LaSalle which applied to the reception and the reproduction of a radio broadcast and the Court said that it found that in this new industry, which it was when it took off, they held it would not find that that was not a performance by cable television but it did not overrule Buck and Jewell-LaSalle. Now, we have here a radio broadcast that was licensed initially but the license provides that that shall not give any receiver of that broadcast the right to reproduce that pub-

licly for profit. There was no such limitation in the Jewell-LaSalle case because, of course, there wasn't a license. The original broadcast, there couldn't have been a limitation but there had been this case of Buck v. De Baum (32) where the Court implied a license to reproduce publicly at the point of reception. There was a provision thereafter inserted, one that I worked on myself for the radio broadcasting license agreement that negatives any possible implied license after that.

Q. That is the clause which you have read and discussed earlier in your testimony? A. That is correct.

Mr. Frazier: Will you refresh my memory as to that clause?

The Court: The first paragraph of the licensing agreement.

A. That came up, I believe that issue came up in the SESAC Society of European Stage Authors and Composers against New York Statler Hotel. I think Judge Woolsey held that these are separate performance. He said that they wouldn't have an implied license, anyway, but that the provision in the agreement negatives the possibility of any implication of a license.

Mr. Wycoff: Your Honor, I know it is a little unorthodox, I would ask that if you do have any other question regarding the Fortnightly case since he did appear and argue the case in the Second Circuit and argued it before the Supreme Court—

The Court: (Interposing) I gathered that was Mr. Nimmer's analysis of the case.

(33) Mr. Wycoff: He kept the footnotes just the way the Court quoted. I talked to him about it.

The Court: Anything further?

Herman Finkelstein—for Plaintiff—Cross.

By Mr. Wycoff:

Q. Just to go back for a moment, Mr. Finkelstein, in the 1950's way before the Fortnightly case did the Society enter into a direct license agreement with retail establishments that broadcast radio over loudspeakers? A. Oh, yes, many of them.

Q. Can you give us an example? A. Well, I, personally, participated in the one with the Kroger Stores back in 1957. There have been others, the Thrifty Drugs and, oh, many of them and these were broadcasts of radio over loudspeakers and their individual license. I pointed out before there were over 5,100 individuals licensed by the Society.

Q. One point I failed to bring out earlier in your testimony, would you state what is the right of a composer to license his own work? A. The author reserves the right to license independently so that if he and the users would work out their own arrangements that would not go through the Society at all.

Q. So for Mr. Aiken to use this music in his store he could go directly to musical composers and enter into a license (34) with them to use their music? A. By all means.

Mr. Wycoff: I have nothing further, Mr. Finkelstein.

The Court: Mr. Frazier?

Cross Examination by Mr. Frazier:

Q. You mentioned Kroger Stores? A. Yes, I did.

Q. Did they play on regular programs or did they play tapes, what sort of program did they play? A. Radio.

Q. Just a plain radio with commercials? A. Just the way that it was broadcast, yes.

Q. They don't beep on any commercial? A. No, that was not a beeping operation. We do have such licenses but that wasn't Kroger. When they operate the beep ASCAP licenses the supplier of the music, that is like Muzak.

Q. So Kroger just played ordinary regular broadcasts? A. Yes.

Q. Where they might even give a commercial? A. Oh, yes, surely, anything that came over the air. So his Honor understands that beeping operation, you can use what they call a beeper to beep out or nullify the commercials (35) so they are not heard and the Kroger operation did not involve a beeping operation but, rather, involved just the ordinary radio reception as in this case.

Q. So they were not restricted in any way whatsoever as to what they could play? A. Oh, no, you mean, if it was radio?

Q. Were Krogers allowed to play records? A. Oh, yes.

Q. Were they allowed to play tapes? A. Yes, anybody that has a license to perform by means of radio also has a license to perform by means of records or tapes, that is the standard form of license because the minimum rate of $60.00 a year gives permission to do all those three things.

Q. Can you testify on information as to the type of broadcasts which Krogers utilized? A. Oh, yes, I knew at that time, yes, it was the regular reception.

Q. Do you know what particular stations they were? A. I did know at that time.

Q. But they were not restricted as to radio broadcasts, is that right? A. Oh, no, there is no restriction. In every contract the Society enters into the use can be radio for that kind, for the $60.00 radio, the use can be radio, record or tapes.

(36) Q. Another question with regards to the home receiving set? A. Yes.

Q. Would this new advance in technology which you

state where there is more than one speaker radio today? A. We are talking about the ordinary home receiving set without loudspeakers and, by the way, the bill HR 2512 distinguishes between the ordinary. It was a common use or some phrase like that, just a moment, I will tell you. A single receiving apparatus of the kind commonly used in private homes, not just anyone but the kinds commonly used.

Q. That is in 1967, five years ago? A. That is right.

Q. Yes, would you take note of the fact that radio has been built today, FM? A. Radio with several speakers.

> Mr. Wycoff: Excuse me, are you saying several speakers in the radio apparatus, itself, or are you talking about external speakers?
>
> Mr. Frazier: Either external or internal.
>
> Mr. Wycoff: In the ceiling? The idea is I am just trying to know whether the radio reception sets today for FM have several speakers.

A. I don't know how the set was constructed and ASCAP would draw no distinction if it was the set commonly used in the home and that was the kind of thing used in the establish- (37) ment. ASCAP would not endeavor to charge a license fee for that use but at the point of separate loudspeakers away from the set, itself.

By Mr. Frazier:

Q. As to this bill did ASCAP have a lobbyist present, an enforcer to more or less inform the lawmakers as to how they felt about it? A. I appeared before the committee, myself.

Q. Thank you, you testified as to the uniformity of the practice of ASCAP, how do they proceed, with unauthor-

ized, do they tend to litigate like unauthorized practices on the part of their licensees? A. You mean, what we regard as infringements?

Mr. Wycoff: Your Honor, excuse me, I object to that question, I don't understand it.

By Mr. Frazier:

Q. Well, maybe I will reword it. Did ASCAP at any time bring action against or revoke licenses for improper uses of their licensees? A. I am sorry, I don't understand the question?

Mr. Wycoff: Also, your Honor, I don't believe it is relevant.

Mr. Frazier: He testified uniformly more or less as (38) a universal policy.

Mr. Stitt: Your Honor, may I ask to have a conference with counsel for a moment?

By Mr. Frazier:

Q. What is their policy as to the other so-called competitors if a party is licensed by one of your competitors, I mean, do you have an agreement to leave them alone or else you enforce? A. Oh, no, ASCAP licenses the use of its repertories and the other licensing organizations license the use of their repertories. These are separate repertories.

Q. Everybody is subject to one license, you cannot offer them a universal license? A. ASCAP just offers them a license for its repertory.

Q. Well, then, BMI or other organizations can enforce their licensing on all of your members, is that right? A. Not that, our members may or may not be informed of

businesses that perform. You probably don't mean licensing, do you?

Q. I probably do but I am just trying to say that you cannot offer uniform licensing, the other organizations similar to yours are competitors if somebody subscribes to their membership, do you leave them alone or do you proceed with them to have them engage your particular services also?

(39) Mr. Wycoff: Excuse me, your Honor, I object to this line of testimony. I don't see where it is leading and I don't see how it has anything to do with what we were discussing on direct examination or what bearing what ASCAP's competitors do in this particular case in this infringement.

The Court: Objection overruled, background information.

A. We don't know anything about specific places where, BMI or SESAC, the other two licensing organizations, have licenses; nor is it a matter of any concern to us. We wouldn't know what they do in terms of specific licensing. I know their policies pretty much.

By Mr. Frazier:

Q. What is your problem with people concerning people who are BMI members? A. I don't understand the question because ASCAP can only represent the music of those people, writers and publishers who are its members.

Q. Do you have uniform control of every publisher that holds out music, do you control each and every one of them, do you have in your repertory every publication of music? A. You mean, throughout the world?

Q. Right. A. Oh, no.

Herman Finkelstein—for Plaintiff—Cross.

(40) Q. This is what I am trying to say, what is your policy in regard to people who have signed up with these other organizations other than yourself, what is your policy as to people who have licensing in other organizations?

Mr. Wycoff: Mr. Frazier, excuse me, is your question what is ASCAP's policy if a commercial establishment has a BMI license but they are also using our music?

By Mr. Frazier:

Q. What is your policy as to competitors who have one of your competitor's licenses? A. I think I understand what you are trying to get at. Let me see if I can state that. I think your question is, first, to put it in its simplest terms, is there any relationship whatsoever between ASCAP and the other licensing organizations and the answer to that would be no. And then would ASCAP know or be concerned with the question of whether a particular establishment has a SESAC license or BMI license and there again the answer to that would be no. BMI or SESAC, the answer to that would be no. I wonder if that answers your question?

Q. What I am trying to say is that any of these establishments are subject to suits such as Mr. Aiken here if they happen to play a BMI number or SESAC number then they can be brought into Court here today just as Mr. Aiken? (41) A. Oh, yes, true, if they infringe any number, be it ASCAP, BMI or SESAC, they can be brought into Court but as a practical matter a given user decides for himself what he thinks he needs.

Q. He is subject to lawsuit, you can't offer universal coverage, do you have any agrement with BMI? A. No. By the way, I hesitated there because I thought you hadn't finished your question.

Q. When I say "agreement" I mean any relationship, business relationship or something that relates to business directly? A. None whatsoever.

Q. What percentage of the published music do you control? A. That is awfully hard to say. We have no occasion to make that kind of an analysis because music that is published without being performed would have no relevance.

Q. As to published music, I mean, you do have some competitors, they probably have some tunes that are also published? A. Oh, surely.

Q. What is your percentage? A. It would depend on the use by a particular user. Some users will perform much more ASCAP music than it performs others. Other users will perform much less.

Q. You are talking about radio stations? A. Whether it be radio or anything else. Now, you have symphony orchestras.

(42) Q. We are just discussing radio broadcasts. A. That would depend on the radio station, what they call the top 40 stations have a different form from stations such as WQXR, the so-called good music station in New York.

Q. Mr. Aiken and other establishments which have licensing agreements with ASCAP, they are still subject to other organizations such as yours, would that be right? A. The answer to that would be yes if they performed the work from those other repertories.

Q. Thank you. I think you mentioned when you gave your description that cable TV was in its infancy when the Court made its decision, is that right? A. Yes, sir.

Q. Would you consider an excess of two million subscribers as an infancy organization with $150,000,000.00 worth of revenue a year an infancy organization? A. The answer to that is yes in the case of cable television.

Q. Well, no, I just asked you as to its infancy? A. Well,

the answer is that it is still in its infancy, it is becoming a very healthy infant. I think it is still in its infancy.

Q. How much business does ASCAP do a year? A. Well, ASCAP's gross is about $70,000,000.00 a year.

Q. So a company that does in excess of $150,000,000 is in its infancy in your organization and has been in being for how (43) long, sir? A. Oh, since 1914.

Q. And so you would still like to indicate that a company that does twice the business you do is still in its infancy even if it has been in business since 1914? A. Yes, I think I know enough about cable television, yes, it is in its infancy. In some large cities cable television hasn't entered at all. In New York City it really hasn't gotten a major start. I don't think Philadelphia has cable television yet so I think ultimately, that this is just my own opinion, I think cable television will supersede television as we now know it.

Q. Would you say that ASCAP is more or less just beginning if they are liable to come in and license fast food franchises? Anybody that plays the radio for the public that has in excess of one speaker, would you say that ASCAP is in its infancy, also? A. No, I would say that ASCAP is quite mature.

Q. As to potential licensees, anybody that plays a radio with in excess of one speaker is subject to a licesing agreement with you people, is that right? A. Oh, yes, but you will find that for the most part when they start putting loudspeakers in the establishment and that is an extensive setup and they are going to think at that time shall they go along with Muzak or one of those types of (44) organization that Muzak will make their installation for them and all that or shall they pay, you know, a very nominal copyright royalty considering that you are getting the music of Bert Bachrach—

Q. Well—

Mr. Wycoff (Interposing): Mr. Frazier, please let the witness finish his answer to your question.

A. (Continuing) For this $60.00 they get all the music of people like Bert Bachrach, Irving Berlin, the Cole Porter repertory, Rodgers & Hammerstein, the Gershwin music. Cy Coleman, some of the other things, symphonic writers, whatever there is, not all of these but all these writers their works are available for only $5.00 a month. I would say that is the biggest bargain that there is in the American musical world.

Q. Don't you think they have a feeling maybe it is unjust enrichment but the fact is that the real commercials go right along with it and the one who is performing is also paying a fee. A. Well, you see radio is in the same position in music. The amount charged for each performance is so small that it just isn't feasible for a broadcaster or for anybody else that makes a great use of music to have separate licenses for each individual work and as ASCAP exists both for the convenience of its members because they couldn't (45) afford to check on uses or to negotiate for separate uses, and for the user who makes a multiple use and just needs some vehicle through which to acquire these rights. Now, ASCAP makes all these rights available, they can't say to the broadcaster, "When you buy a license from ASCAP you have to buy not only a license for what you do, sending these musical sound waves out, but also for any place that might pick it up." We can't say that, we can't impose upon them an obligation to pay for something the law doesn't compel them to acquire.

Q. Would you repeat that again, please? A. I say we can't insist that the broadcaster or any users buy a license that the law doesn't require them to buy considering what they do. And when the broadcaster broadcasts he doesn't need a separate license for the performance in the

homes because that is private. But when a recipient of the broadcast puts it out over loudspeakers to the Public, if the broadcaster had to buy the right to authorize that at the receiving end the broadcaster would have to pay for that, he wouldn't get it for nothing and it isn't paid for at that end now.

Q. Do you think that ASCAP should impose upon them some kind of restrictions or some kind of warning in the broadcasters that any reproduction of this broadcast not authorized is strictly prohibited? (46) A. That would be a terrible interference, wouldn't it, if every time you turned on your radio set in the home because you couldn't beep it out of the home if you always had to hear that an unauthorized public performance is prohibited every time they change the program, I think that would be a terrible interference with what the American Public is in the habit of receiving. The commercial announcements are bad enough interference as it is.

Q. Do you feel that the legislatures who enacted this law copyrighted all the music publications as a right strictly imposed upon the publication that is copyrighted and protected? A. I am afraid I don't understand your question?

Q. Do you think that the Legislature when they enacted this legislation at that time I think it was mainly for music published, music that they indicated that it should be presented on their particular music transcript, that it is copyrighted? A. Quite the contrary, a record does not require a copyright notice on it for part of the work recorded, the musical composition, unlike sheet music, a record doesn't nor does a performance require it under the law.

Q. I believe in the sports presentations they indicate that any unauthorized user, this is prohibited, is that right? A. Yes, because it is not copyrighted and they want to be sure (47) that they preserve their rights.

Herman Finkelstein—for Plaintiff—Cross.

Q. Do you think the copyright people have the right to protect themselves, also? A. Oh, I think that they have the right and I think that the law grants it without the necessity of any further statement.

Q. They don't have to put some kind of infringer on notice that he is infringing? A. That notice is provided for in the law and the law provides that every published copy of the work must contain a copyright notice, the year of publication, which is the year of the copyright and the name of the copyright owner. That is required on the publication, the physical copy but not on anything other than the physical copy or in any other way, not even on phonograph records. They are not considered a copy.

Q. The phonograph records have already paid their licensing agreement, is that right? A. The phonograph manufacturer pays for only what the law requires him to pay, that is the right to make the record, itself. Once a single recording is authorized the maximum rate that can be charged is two cents to any other record manufacturer. That was in the 1909 law. And otherwise, it gives the recording manufacturer the right once the copyright owner has authorized any manufacturer to (48) record the work, any other manufacturers may record that work on paying two cents to the copyright owner. Then it says that the payment of the two cent royalty shall not free the work from an obligation to pay for public performances of the work.

Q. So then the radio broadcaster which is made pays for the performance, is that right? A. Yes.

Q. They pay for the performance, is that right? A. Yes.

Q. They are performers? In regards to the first-nighter situation, how did they refer to the Buck v. Jewell case?

Mr. Wycoff: Do you mean Fortnightly?

Mr. Frazier: Right.

A. Oh, I think that is a matter of record. We can look at the opinion, itself, of course, to find that out.

By Mr. Frazier:

Q. You testified before as to the contents, how did they refer to it? A. I think you are asking for the precise language and I think I have a copy of the Fortnightly opinion here.

Mr. Wycoff: I would object to the question. He is asking as to precisely the opinion.

(49) The Court: You may ask him his opinion.

Mr. Frazier:

Q. When they made the statement it was a questionable 25-year old decision, what is your opinion on that?

Mr. Wycoff: What is the questionable 25-year old opinion, would you state that, please?

A. Well, the facts before that Court were on whether the cable television, whether the doctrine of Buck v. Jewell-LaSalle should be applied to the cable television situation, the Court did make a statement about that case being a questionable authority or some words to that effect.

Q. A questionable 35-year old decision, is that right? A. I think there is something to that effect in the majority opinion.

Q. And they did state that it was not a performance on the part of the cable television? A. By cable television.

Q. And did they draw a line between a broadcaster and a viewer and with all the instrumentalities on the part of the cable TV they still held that the cable TV suppliers to homes for a profit and still were a viewer and not a broadcaster? A. They said it was more nearly like the viewer than the broadcaster and, of course, Justice Fortas showed

that it was quite an immaterial statement to be put in the opinion.

Q. What else did Mr. Fortas have to say?

(50) Mr. Wycoff: I object to that again, you are asking him for specific language. You may ask him an opinion.

The Court: Too broad a question.

By Mr. Frazier:

Q. What is your opinion of Mr. Fortas' decision? A. It was just a dissent, I accept it as a dissent.

Q. As a dissent? One more, you as an expert in this particular field, what is your opinion of Nimmer? A. Oh, I think Nimmer is a very bright man. He teaches an excellent course in copyright and I have lectured in his class and he is a good friend of mine. I think he is wrong in that footnote quoted by the Court. I know he is wrong, I still have a high opinion of him.

Q. Do you think it is right? A. No, I think he isn't informed. I don't know to what extent he prepared the statement he published or that was published with his authority. I would say he is wrong, I know he is wrong because he is quoting a practice that I know is a misstatement of what is the practice because I was there and he wasn't.

Q. And maybe that you are employed by ASCAP and he is an individual independent offering an independent service?

Mr. Wycoff: Is that an argument or a question?

Mr. Frazier: No more questions.

(51) The Court: Mr. Finkelstein, I think when Mr. Frazier was referring to the number of radio sets which are sold in the form of components, for example, you buy your separate speakers does ASCAP feel that sort of radio in distribution would

fall within the definition of a separate type of loudspeaker?

A. Is your Honor referring to those complicated stereophonic reception devices?

The Court: You may buy three or four speaker units, for example, in a little cabinet type and spot them around the room, put them around the room.

A. I would say that if that is done in a Public place that they don't have the type of set that you commonly see in a home. The common thing in a home is just the set, itself but many homes can afford to have these separate speakers but the kind of thing that we have not been making a charge for is the ordinary commonly used home receiving set. Of course, in the home that is a private performance.

The Court: Suppose that Mr. Aiken in this case instead of having three speakers in the ceiling decided to have three little home receiving units spotted throughout the store, what is your position on that?

A. We haven't run up against that, we have never seen that. We would probably decide that the policy of the single set ought not to be applied to that situation but we haven't (52) come up against that and, by the way, the bill that went through the House talks about a single receiving set, doesn't it? I think the Congress had that in mind.

The Court: On a single receiving apparatus.

A. Yes, and they intend to limit it to just one set and it just applies to that set, the kind of thing when it says commonly used in the home to emphasize the thing and not

somebody who can afford it and wires his whole home and not that kind of thing.

The Court: Very well, thank you.

The Witness: Thank you.

(Witness excused.)

Mr. Wycoff: Just one moment. We have nothing further, your Honor.

PLAINTIFF RESTS

Mr. Frazier: Do you rest your case?

Mr. Wycoff: Yes.

Mr. Frazier: If that is the case may I make a motion for a directed verdict?

The Court: I don't think a directed verdict would be appropriate in this type of case. I will hear all the evidence and then the law from your briefs.

(53) DEFENDANT'S CASE IN CHIEF:

Mr. Frazier: Your Honor, may I cite my reasons for a directed verdict at this time?

The Court: I am going to refuse it because I have heard the question as I see it under the evidence does the Buck and Jewell-LaSalle case apply or does the Fortnightly case apply.

Mr. Frazier: Mr. Aiken, please?

GEORGE AIKEN, called and sworn as a witness in his own behalf testified as follows:

Direct Examination by Mr. Frazier:

Q. Would you state your name for the Court, please? A. George Aiken.

George Aiken—For Defendant—Direct.

Q. Mr. Aiken, you are named as a defendant in this case as the proprietor of a fast food service, is that right? A. Yes, sir.

Q. Could you briefly describe to the Court your operation, what it consists of?

Mr. Wycoff: Excuse me, your Honor, based on the stipulations that we have I don't know if this testimony is relevant to any issue in the case.

The Court: Objection overruled.

(54) A. Well, we are primarily these people say restaurant but it is primarily a delicatessen operation. I think anybody who has been in our stores can attest to that and for years we have been playing music in the store primarily for the enjoyment of the employees. The thing so far as speakers in the ceiling and that came about primarily I believe through the development of this transistor system and it lowers the prices and for years we did play strictly through radio. And we found at this time most of the time you have to put the radio somewhere behind the counter and this interfered with the employees in their conversation with the customers. And you speak of speakers in the ceiling and we put those in the ceiling with the intent that we do have the music and we do have it strictly for the employees because I would say 40 percent of the time during the time we are open at nine o'clock in the morning until six o'clock in the afternoon there are no customers in the store. It is usually during lunchtime or evening when they are taking food home. The boy that is in the store, Dennis, I don't think he saw the receiving set. There are two speakers. If he would look further he would also see a speaker in the kitchen, in the office and the girls' wash room so we do concern ourselves with the employees. The speakers in the ceiling, like I said, were primarily to take the near effect of the radio blaring in (55) the employees'

ears away. We don't primarily play any particular radio station. We play one that doesn't play a wild type of thing because I think it works against the customer and employee relationship but we do also pick up all the commercial news broadcasts or whatever comes over the radio. I don't know how the law reads on this. If the law says that is the case it is the case but somebody coming around just for a shakedown then this I bitterly contest.

Q. Mr. Aiken, do you turn off your radio when business is slow and there is nobody in the store? A. My radio comes on the moment the employees start.

Q. No, if there are no patrons or no customers in the store which at times happens you still continue to play the radio? A. Why certainly.

Q. Mr. Aiken, what is the average time a person stays in your store? A. Pickup customers, which are 60 percent of the business, is maybe two, three or four minutes, five at the most, a sitdown customer and they have to carry their food to the table, we don't supply waitresses and it is all on disposable paper, that person isn't in there generally more than ten to fifteen minutes at the very most.

Q. Mr. Aiken, what do you charge for a cup of coffee? (56) A. Ten cents.

Q. Do you think that your food is being undersold anywhere in town?

Mr. Wycoff: Your Honor, I object to that as having absolutely no relevance to this case whatsoever.

Mr. Frazier: I think it does under your case law.

The Court: The objection is overruled.

A. I think we aren't the cheapest in town, there are some much cheaper.

Mr. Frazier: I have no more questions.

George Aiken—For Defendant—Cross.
George Aiken—For Defendant—Recross.

Cross Examination by Mr. Wycoff:

Q. Mr. Aiken, you do not deny, however, that there are three speakers that are in the ceiling out in the Public part where the Public sits? A. Two speakers.

Q. You say there are only two? A. Yes.

Q. May we have Plaintiff's Exhibit 1? In the 7th Avenue and Liberty Avenue store this was the drawing that was put into evidence earlier by Mr. Cercone stating that there are speakers? A. This one.

Q. Which is not there? (57) A. This one right there.

Q. You say there are two speakers? A. Yes.

Q. They are audible to the employees? A. Yes.

Q. And the employees most of the time are behind the counter, aren't they? A. You can't put a speaker over an employee's head, if I were to put speakers they wouldn't hear the customer, No. 1.

Q. If the speaker is lower than the barrier there they can only hear these speakers? A. The employees, you mean?

Q. Yes, behind the counter back here. A. Fine, you go in one of my stores and turn the radio off I would probably have them walking off on me.

Redirect Examination by Mr. Frazier:

Q. Mr. Aiken, he submitted this in evidence, you indicate there are two speakers here? A. Yes.

Q. How many speakers do you have in the store? A. Five, one is in the kitchen, one is in the office and one is in the wash room.

(58) Recross Examination by Mr. Wycoff:

Q. Your position is that the speakers keep your employees happy? A. Certainly.

Q. If they are happy do they work more efficiently? A. Yes, sir.

George Aiken—For Defendant—Redirect.

Q. Does that keep everyone happier? A. Yes.

Q. So you are using the speakers for a profit? A. When you speak of the profit I am not selling music, people aren't dancing to it, they are not enjoying themselves through it. The customers aren't there long enough to hear more than one or two songs.

Q. They do stand in line while they were waiting for their food and hear the music, do they not? A. Unless they be deaf.

Mr. Wycoff: I have nothing further, your Honor.

Redirect Examination by Mr. Frazier:

Q. Mr. Aiken, he indicated that you benefit a profit from this playing, can you control in any way whatsoever what they are performing, so-called performances, in effect? A. No.

(59) Q. And do you know anybody who goes in your establishment to hear music? A. No.

Mr. Frazier: I have nothing further.

The Court: Thank you, I might ask just one thing, Mr. Aiken, I am not taking sides with either the plaintiff or the defendant at this point because there is a question of law but it really isn't a question of a party trying to shake down someone else, we have a little bit more complicated problem here where the composer is entitled to be paid for the results of his labor, his creative ability and unless there is some way to get royalties on his songs he will never get paid so that is the theory that the plaintiffs are using. Now, your theme is ordinarily that you are running a commercial establishment and that you want to get music that is readily available by turning a knob on a radio set and help everybody be more comfortable and efficient, that works in your shop and you don't think that

there should be an additional payment maybe because that is readily available and these are the two points of view. I am not saying which side I think should govern because it is a matter of law but it isn't a question of a shakedown, it is a legitimate dispute between the parties as to what we do with this particular problem.

Mr. Aiken: Apparently, your Honor, maybe I worded it (60) wrong. Let me state I don't believe that anybody, I don't think anybody should take up the time of the Court on little penny ante things like this. I could easily well pay the license but I think there comes a time in a business you have to say well is it really a law or isn't it. Now, if it is a bona fide law put through a legislature I will pay but if these people are making up their own laws for their benefit the most they can do then is picket my place, then let them picket if the law says I will have to pay I will pay.

The Court: It is a legal question.

Mr. Aiken: That is all I would like to clarify.

The Court: It is a legal question even though this is a small case I think you can understand when you see how many thousand licenses do you have?

Mr. Wycoff: Over 5,000.

The Court: An adverse decision in this case would affect not only your particular case but 5,000 other ones.

Mr. Aiken: I understand that, too, and I think this is sometimes why a lot of these things, Mr. Frazier, he more or less contended that I should just pay the license and forget it, it wasn't worth fighting over and in general this would be the case but sometimes you have to say what is right and what is wrong.

The Court: I will check the law and see what it is.

(61) Mr. Aiken: It is perfectly all right.

(Witness excused.)

Mr. Wycoff: Do you rest your case?

Mr. Frazier: Well, your Honor, at this time my argument indicates that there was no performance on the

part of Mr. Aiken and there was no law to support it. Directly to the fact similar or in kind to the Aiken situation. The plaintiffs make their contentions in cases 40 years ago. Their whole support they bring in no recent case law whatsoever and in regards to the Fortnightly case where they claimed that they had the cable TV is not performing. I think that the relationship to somebody playing a radio would be quite similar because on the case that they rely their whole case was presented on the LaSalle case in which case the original broadcaster was not licensed. Now, they haven't presented any evidence whatsoever in regards to case law or Court ruling as to broadcasts which are previously licensed or in kind similar to the Aiken case. If you either refer to somebody that pumped in music or played records but they have no law to support whatsoever in regards to the number of speakers. This was their own theory and it was unsupported by any law and we feel that this case is not based on any law strictly on the ability of ASCAP to license wherever they may. And apparently we rely (62) on Niemer as an authority in this bill and he indicates that ASCAP haven't proceeded to the extent which they possibly could to license every restaurant, bar or tavern as such. And that we also have an argument in regard to, there is implied in law license that the agreement between the licensor, ASCAP, and the licensee has no relationship whatsoever to somebody who happens to receive a broadcast. And that if it is to be enforced there is a violation, I believe that the licensee should have been brought here as a party. They indicated all through their relationship with the licensor and the licensee that they failed to establish a contract relationship between Mr. Aiken and the licensor.

And in regards to the law they haven't presented any evidence of holding with the mere playing of a radio without beeping out a commercial in its entirety has been the

law where one must obtain a license for infringement on the copyright law and in the recent case on the cable TV as to a performer if the cable TV people who received these waves and amplify them and transmit them through cables to purchasers of their system definitely do profit that holding of the law, the Buck and LaSalle are no longer in being as to the particular case of somebody who plays a radio and receives no direct financial remuneration and that we feel that there is no infringement of the expressly (63) enumerated rights protected by the copyright law but in the LaSalle case the chief case which they hold was where the original broadcaster was unlicensed and had he been licensed it might have had an entirely different conclusion. If Mr. Aiken played the radio he doesn't play records, he doesn't play tapes. He plays a radio in its entirety and that all the broadcasts he receives are licensed broadcasts and, therefore, we think that he has a license implied in law to play it provided by the restriction saying that a profit is generated by it.

Now, Mr. Aiken testified that he charged 10 cents for a cup of coffee and food can be obtained there cheaper. I think it is very difficult to find a place in the City of Pittsburgh where you can find a cup of coffee for ten cents. Practically anywhere in the country we can definitely testify a very important essence of the case that he is operating it publicly for profit and we feel that Mr. Aiken plays this music strictly for the benefit of his employees as he indicated in his testimony that there was three speakers, three out of the five that were not available to the general public. And that the new change in technology in regards to receiving sets as such even the automobile today has a rear speaker so their argument is unfounded and I repeated before there was no law in which they can relate their case and that Mr. Aiken (64) did not perform as to the CATV cases and he definitely did not perform

for a profit. I don't believe the cable TV case went so far as the profit is concerned, there is no doubt about that there since they indicated there was no performance it wasn't necessary to rule on it, no profit. The only evidence which they submitted was the Jewell case and it is definitely not in kind with that of Aiken's case or the case at bar being the original broadcaster was unlicensed.

We feel that to force a player of a radio even though it is within earshot range of the public to pay an additional fee would be unjust enrichment. In the original records a fee was paid for the production of the record and also a fee was paid by the broadcasting station.

Mr. Wycoff: Your Honor, my remarks will be very short because I know that you are aware of the issues in the cases and exactly the decision you have to look to but as to Mr. Frazier's argument about the implied license I think there is no statutory basis or any basis in law for his comments on that and I think that the SESAC v. Statler-Hilton case obviated the problem that was raised in the Buck v. Jewell-LaSalle apparently was not a restriction in the license agreement with Jewell-LaSalle, there was a restriction that did have the license agreement in it, they still found that there was an infringement as to the (65) Fortnightly case, your Honor, I do want to point out that the facts in that case were different from the facts in this case here because in Fortnightly it was talking about television reception in the home. In their Footnote No. 2 they are talking about the community that CATV-TV system serviced. I think seven out of eleven households had this system and in the other one I think it was five out of 9,000 and throughout their opinion they are talking about bringing this to households for their own use in private homes and there was no mention at all about using the television there for public purposes. I think that is a very important thing. This music was heard in a Public res-

taurant. They do hear the music, the employees hear it, we can cite no exclusion in the law that that is not a Public performance for profit. We maintain in an English case under a similar law has very definitely said that it is a Public performance for profit so Fortnightly is different than the present case because here the restaurant the music was being used in a Public place and not in the private home as were the television receivers that were receiving the cable TV and I think that what he is restricted to is the facts, I don't think that they were saying that it is just a hotel which has music in its Public rooms and the rooms. I think they are looking at the more overall picture of the Public use of music in a Public (66) place such as a restaurant as George Aiken's Chicken or the dining room of a hotel.

And the case in Buck v. LaSalle I am sure you are aware that Justice Brandeis did say there is no difference between a hotel having a radio or an orchestra, it is using music by instruments under its control and here Mr. Aiken is doing the same thing, using music by instruments under its control and we did not cite in our brief but I would take you back to it, your Honor, in the brief that we filed in opposition to Mr. Frazier's motion to dismiss still the classic statement of the law in this area has been the case of Herbert v. Shanley where Justice Holmes sets forth that the use of the music in a dining room the importance that it can have in an eating establishment that the owner of such an eating establishment is not running an eleemosynary institution and that the Public pays for it and if it only momentarily gives a benefit to the people in the dining room at George Aiken's Chicken while they are waiting for their food or to the employees, that they work more efficiently it is paying for itself in that way because as you pointed out these were musical compositions which are copyrighted. It is the intellectual property and someone else using it without obligation or authorization is using

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someone else's property and I think we all feel that using someone else's property without (67) authorization is wrong. In the Fortnightly case it is shown in the implication of it it was extending the doctrine of Buck v. Jewell-LaSalle to a new industry, to a new fact situation where license fees had not been collected heretofore and that in the brief filed in the Supreme Court it was estimated that the cable TV companies would be subject to infringement of almost a million dollars per month for this type of infringement if the case had been extended and I think that it was as much an economic decision as it was a legal decision. But we maintained very strongly that still the law of the case that has developed and the law for the broadcasting of radio over three speakers was not disturbed by that decision.

Mr. Frazier: Your Honor, the Herbert v. Shanley case, this is the case where an orchestra was playing, it was a restaurant and the rationale of the Court's decision is that the food could be obtained cheaply someplace else in lieu of the music. We presented evidence that George Aiken sells coffee for ten cents and other food prices are way below par. The food is probably cheaper than anyplace in the City of Pittsburgh and cheaper to a large degree. Now, the Shanley case was based on an orchestra place where people were sitting down enjoying themselves. There is no relationship involved. When they are letting the monopoly, (68) it was not to extend to any Tom, Dick and Harry that has a radio just because the speaker system was commenced to play, just because he has a radio playing that he is subject to the copyright. When Mr. Corman and I stopped at George Aiken's Chicken we were charged 15 cents for coffee, that is neither here nor there.

Mr. Wycoff: Mr. Frazier, if you would like a cup of this?

The Court: I thought that you were offering to take him down to the place and get him a cup of coffee.

Mr. Wycoff: Well, if it is crucial, your Honor, as to how many speakers are in that ceiling I think we will have to have a view.

The Court: Thank you very much, gentlemen. I will take the case under advisement.

Mr. Wycoff: Thank you very much, your Honor.

Certified: a true and accurate transcript.

C. R. SHUFF
Official Court Reporter

Plaintiffs' Exhibit 1.

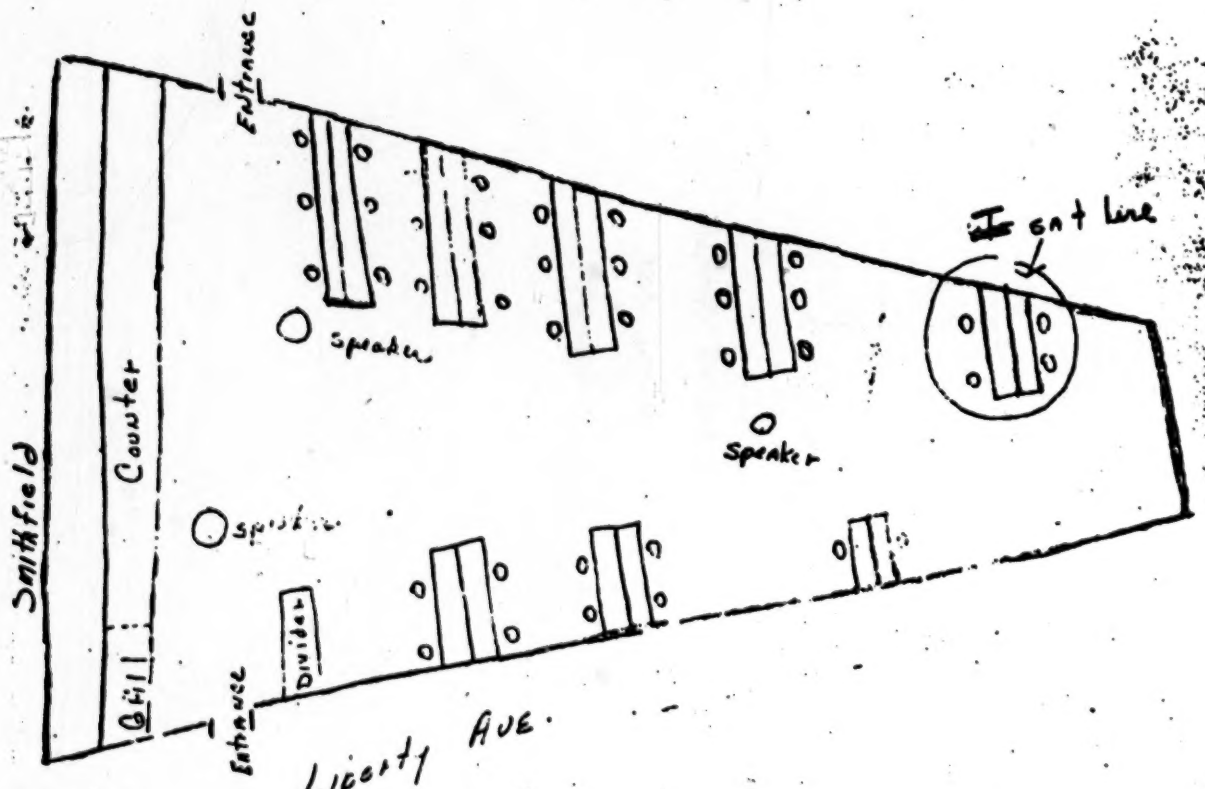
Notes and Sketch.

(Photoprint)

Appendix F

Petitioners' Exhibit 1 (Notes and Sketch) and Exhibit 2 (Radio License) at Trial Below

(Pages 68A to 75A)



c/Lorenzo Piccone
George Aikens on
Liberty Ave. - Smithfield
and 7th Ave.
2/11/72

Plaintiffs' Exhibit 2.

Radio License.

(Photoprints)

71 A

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS
One Lincoln Plaza
New York, New York 10023

Re: Radio Station WKJF FM
City Pittsburgh,
State Pennsylvania

Gentlemen:

The radio license agreement between us will expire on February 29, 1972. You and we hereby agree to extend the agreement, and all of the terms, conditions and provisions thereof, for an additional term commencing March 1, 1972 and expiring on the last day of the third full calendar month following the date of a written notice of termination given at any time by either of us to the other by registered or certified mail.

This extension agreement is subject to retroactive adjustment on the basis of the terms and conditions arrived at for the period beginning March 1, 1972 (1) by negotiation between you and the All-Industry Radio Music License Committee or (2) by Court determination of reasonable fees in any proceeding brought by the All-Industry Radio Music License Committee for a determination of reasonable license fees under the Consent Decree.

Your signature underneath the word "ACCEPTED", together with our signature below, will make this a valid, binding and enforceable extension agreement between us.

Sincerely yours,

LICENSEE WKJF, INC.
(Full corporate or other name of station owner)

By Paul S. Lindsey

Treasurer
(Fill in capacity in which signed)

(a) If corporation, state corporate office held;

(b) If partnership, write word "partner" under signature of signing partner;

(c) If individual owner, write "individual owner" under signature.

ACCEPTED:

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS

By Louis P. Weber

Dated: MAR 2 - 1972

LOCAL STATION BLANKET RADIO LICENSE

SEP 3 1967

72 A

Agreement made between AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS (herein referred to as "SOCIETY") and WKJF, INC.

(herein referred to as "LICENSEE") as follows:

1. SOCIETY grants to LICENSEE and LICENSEE accepts for a period commencing as of March 1, 1967 and ending February 29, 1972, a license to perform publicly by radio broadcasting on LICENSEE'S local radio programs from Radio Station WKJF, - FM located at

1715 Grandview Avenue, Pittsburgh, Pennsylvania

(herein referred to as "the Station") non-dramatic performances of the separate musical compositions heretofore copyrighted, composed or written by members of SOCIETY and now or hereafter during the term hereof in the repertory of SOCIETY, or hereafter during the term hereof copyrighted, composed or written by members of SOCIETY, or of which SOCIETY shall have the right to license such performing rights. This license does not extend to or include the public performance by radio broadcasting or otherwise of any rendition or performance of any opera, operetta, musical comedy, play or like production, as such, in whole or in part. Nothing herein contained shall be construed as authorizing LICENSEE to grant to others any right to reproduce or perform publicly for profit by any means, method or process whatsoever, any of the musical compositions licensed hereunder or as authorizing any receiver of any radio broadcast to perform publicly or reproduce the same for profit, by any means, method or process whatsoever.

2. A. "Local radio program" as used in this agreement shall be deemed to mean any program broadcast from the Station other than a network radio program. The performances licensed hereunder may originate at the Station or at any other place whether or not such other place is licensed to perform publicly for profit the compositions licensed hereunder, regardless of the manner, means, or method of such origination; but nothing herein contained shall be deemed to grant a license to such place itself (or to the parties responsible for the performance therein) for the public performance for profit in such place of any such compositions.

B. "Network radio program" as used in this agreement shall be deemed to mean a program broadcast simultaneously or by so-called "delayed" or "repeat" broadcasts (sometimes known as "rebroadcasts") over two or more affiliated stations.

C. "Affiliated station" as used in this agreement shall be deemed to mean any radio broadcasting station in the United States which regularly broadcasts network radio programs of a radio network or which appears on the radio rate cards of such network and which is interconnected with such network by wire or any other means whatsoever. Such station shall only be deemed to be an affiliated station so long as it regularly broadcasts such programs or appears on such rate cards, as the case may be. All radio broadcasting stations .. the United States which are owned and operated by a network and which broadcast such network's radio programs shall be deemed to be affiliated stations for the purposes of this agreement, whether or not they appear on such network's radio rate cards.

3. LICENSEE agrees to furnish to SOCIETY upon request during the term of this agreement a list of all musical compositions (or, at the option of LICENSEE, a list of all musical compositions licensed hereunder) broadcast from or through the Station on LICENSEE'S local radio programs, showing the title of each composition and the composer and author thereof; provided that LICENSEE shall not be obligated under this paragraph to furnish such a list covering a period or periods in the aggregate in excess of three months during any one calendar year.

4. A. The members of SOCIETY shall have the right, at any time and from time to time, in good faith, to restrict the radio broadcasting of compositions from musical comedies, operas, operettas and motion pictures, or any other composition being excessively broadcast, only for the purpose of preventing harmful effect upon such musical comedies, operas, operettas, motion pictures or compositions, in respect of other interests under the copyrights thereof; provided, however, that the maximum number of compositions which may be at any time thus restricted shall not exceed 500 and moreover that limited licenses will be granted upon application to SOCIETY entirely free of additional charge as to restricted compositions, if and when the copyright owners thereof are unable to show reasonable hazards to their major interests likely to result from such radio broadcasting; and provided further that such right to restrict any such composition shall not be exercised for the purpose of permitting the fixing or regulating of fees for the recording or transcribing of such composition; and provided further that in no case shall any charges, "free plugs", or other consideration be required in respect of any permission granted to perform a restricted composition; and provided further that in no event shall any composition, after the initial radio broadcast thereof, be restricted for the purpose of confining further radio broadcasts thereof to a particular artist, station, network or program.

B. SOCIETY reserves the further right, at any time and from time to time, in good faith, to restrict the radio broadcasting of any compositions, over and above the number specified in the previous paragraph, only as to which any suit has been brought or threatened on a claim that such composition infringes a composition not contained in the repertory of SOCIETY or on a claim that SOCIETY does not have the right to license the public performance of such composition by radio broadcasting.

5. A. In consideration of the license herein granted, LICENSEE agrees to pay to SOCIETY the following:

1. COMMERCIAL FEE: A sum equal to 2% of its "net receipts from sponsors after deduction".

2. SUSTAINING FEE: For each year during the term hereof,

a. 27 times the highest one-minute card rate of the Station for a single minute if it has net receipts from sponsors in excess of $150,000 per year for such year (calculated on a monthly basis at 2¼ times such rate), or,

b. 21.6 times the highest one-minute card rate of the Station for a single minute if it has net receipts from sponsors between $50,000 and $150,000 per year for such year (calculated on a monthly basis at 1.8 times such rate), or,

c. $12.00 if it has net receipts from sponsors of less than $50,000 per year for such year.

If such highest card rates change during any year, the annual sustaining fee of the Station shall be prorated accordingly. The "net receipts from sponsors" for the first year of this agreement are hereby estimated at

ONE HUNDRED AND TWENTY NINE THOUSAND DOLLARS

($ 129,000.00 For each of the succeeding years of this agreement such net

receipts from sponsors shall be estimated on the basis of the actual net receipts from sponsors for the preceding year. Within thirty (30) days after the end of each contract year a final adjustment shall be made on the basis of actual net receipts from sponsors for such contract year. The sustaining fee for any period of less than a year at the end of the term of this agreement shall be prorated.

B. The term "net receipts from sponsors" as used in this agreement shall be deemed to mean the gross amount paid for the use of radio broadcasting facilities of the Station for LICENSEE'S local radio programs, as defined herein, less any advertising agency commission not to exceed 15% actually allowed to a recognized advertising agency not owned or controlled by LICENSEE.

C. The term "net receipts from sponsors after deduction" as used in this agreement shall be deemed to mean net receipts from sponsors, less a sales commission on the net receipts from sponsors equal to 15% of such net receipts.

D. The term "gross amount paid for the use of radio broadcasting facilities of the Station for LICENSEE'S local radio programs" as used in this agreement shall be deemed to mean all payments made (whether in money or in any other form) by or on behalf of the sponsor of each program for the use of the radio broadcasting facilities of the Station for all such local radio programs, after deducting only rate card discounts, cash, quantity and/or frequency, actually allowed, and whether such payment shall have been made directly to LICENSEE or to any other persons, firms or corporations. Where merchandise, services or any thing or service of value is received in lieu of cash consideration for the use of the radio broadcasting facilities of the Station, the same shall be described and the reasonable value thereof determined and accounting made to SOCIETY upon the same basis as if a regular billing had been made by LICENSEE therefor in a sum equal to such reasonable value which in no event shall be deemed to exceed LICENSEE'S prevailing published card rate for such radio broadcasting facilities.

E. There shall be excluded from the "gross amount paid for the use of radio broadcasting facilities of the Station for LICENSEE'S local radio programs" all compensation with respect to any week over and above the total weekly amount indicated below, actually paid by the Station for such week to personnel whose duties primarily are acting as (a) master of ceremonies or disk jockey on musical programs, or (b) vocalist or instrumentalist engaged for a specific program, or (c) featured newscaster and news commentator, or (d) featured sportscaster, or (e) master of ceremonies on an entertainment progam, or (f) announcer:

Station's Annual "Net Receipts from Sponsors"	Total Weekly Amount
Less than $ 50,000	$ 100
$ 50,000 to $ 150,000	$ 300
$150,000 to $ 300,000	$ 450
$300,000 to $ 500,000	$ 675
$500,000 to $ 750,000	$ 750
$750,000 to $1,000,000	$ 875
Over $1,000,000	$1,000

The total weekly amount for each contract year shall be based on the estimates of "net receipts from sponsors" made in accordance with Paragraph "5A2" for the sustaining fee. Within thirty (30) days after the end of each contract year, the total weekly amount for such contract year shall be adjusted on the basis of the actual "net receipts from sponsors" for such contract year.

F. Co-operative programs are programs which are furnished by a network to its affiliated stations under an arrangement permitting an affiliate to broadcast such programs on a sustaining basis or on a commercial basis under the sponsorship of a local, regional or national advertiser contracting directly with such affiliated station or its representative for the incorporation of the commercial credits of such advertiser into the program as broadcast by such affiliated station. For the purposes of this agreement only, and without prejudice to the position of SOCIETY or LICENSEE or any network of which LICENSEE is an affiliated station as to the status of co-operative programs under SOCIETY'S television broadcasting licenses, such co-operative radio programs shall be deemed to be "local radio programs" as defined herein.

G. No payment shall be required hereunder with respect to any sums received from political local radio programs of LICENSEE.

H. No payment shall be required hereunder with respect to a local commercial radio program of LICENSEE presented by transcription if a license has been granted by SOCIETY (as distinguished from its members) at the source to perform on such local commercial radio program by means of such transcription the musical compositions embodied therein.

I. If any local radio program of LICENSEE produced solely for broadcasting purposes is presented in a studio, auditorium or hall where an audience is admitted free of charge, or where the entire admittance charge is paid to an eleemosynary institution which shall request a gratuitous license from SOCIETY, no additional royalties or fees shall be charged by reason of the presence of such audience.

6. A. As to SUSTAINING FEE, LICENSEE shall on the twentieth day of each month during the term hereof pay to SOCIETY a sum equal to 1/12th of the sustaining fee payable hereunder and such payments shall be accompanied by statements setting forth the basis upon which the computation is made.

B. As to COMMERCIAL FEE, LICENSEE shall render monthly statements to SOCIETY on or before the twentieth day of each month covering the period of the preceding calendar month, on forms supplied gratis by SOCIETY, with respect to all gross amounts paid for the use of radio broadcasting facilities for LICENSEE'S local radio programs, and also showing all deductions in order to arrive at "net receipts from sponsors" and "net receipts from sponsors after deduction" as herein provided, without exception, and the percentage thereof payable to SOCIETY, which statements shall be accompanied by remittance due SOCIETY under the terms hereof.

C. Accountings and payments shall be made on a billing basis, with the right of deduction or rebate for bad accounts and discounts allowed or rebates paid. All billings made subsequent to the termination of this agreement with respect to local radio broadcasts made during the term hereof shall be accounted for by LICENSEE as and when such billings are made by LICENSEE.

D. LICENSEE shall also furnish to SOCIETY not later than twenty (20) days after the end of each contract year a statement, on forms supplied gratis by SOCIETY, with respect to all "gross amounts paid for the use of radio broadcasting facilities of the Station for LICENSEE'S local radio programs" during such year, and also showing all deductions in order to arrive at "net receipts from sponsors" for such year as herein provided without exception.

7. SOCIETY shall have the right, by its duly authorized representatives, at any time during customary business hours, to examine the books and records of account of LICENSEE only to such extent as may be necessary to verify any statement of accounting required pursuant hereto. SOCIETY shall consider all data and information coming to its attention as a result of any such examination of books and records as completely and entirely confidential.

8. Upon any breach or default by LICENSEE of any terms herein contained relating to the reports, accountings or payments required to be made by LICENSEE, SOCIETY may give LICENSEE thirty (30) days' notice in writing to cure such breach or default, and in the event that such breach or default has not been cured within said thirty (30) days, SOCIETY may then promptly terminate this license.

9. A. SOCIETY agrees to indemnify, save and hold LICENSEE, its sponsors and their advertising agencies, its and their artists, and each of them harmless, and defend LICENSEE, its sponsors and their advertising agencies, its and their artists, and each of them from and against any claim, demand or suit that may be made or brought against them or any of them with respect to performances given on LICENSEE'S local radio programs during the term hereof in accordance with this license of (a) "cleared compositions", or (b) musical compositions heretofore copyrighted, composed or written by members of SOCIETY and now or hereafter during the term hereof in the repertory of SOCIETY, or (c) musical compositions hereafter during the term hereof copyrighted, composed

or written by members of SOCIETY, or (d) musical compositions which SOCIETY shall hereafter certify in writing to LICENSEE as musical compositions copyrighted, composed or written by members of SOCIETY and included in SOCIETY'S repertory for the purposes of this agreement, or (e) musical compositions "deemed to be included in the repertory of SOCIETY" in accordance with the provisions of Sub-paragraph "C" of this Paragraph "9". In the event of the service upon LICENSEE of any notice, process, paper or pleading under which a claim, demand or action is made or begun against LICENSEE on account of any such matter as is hereinabove referred to, LICENSEE shall promptly give SOCIETY written notice thereof and simultaneously therewith deliver to SOCIETY any such notice, process, paper or pleading, or a copy thereof, and SOCIETY at its own expense shall have sole charge of the defense of any such action or proceeding. LICENSEE, however, shall have the right to engage counsel of its own, at its own expense, who may participate in the defense of any such action or proceeding and with whom counsel for SOCIETY shall cooperate. LICENSEE shall cooperate with SOCIETY in every way in the defense of any such action or proceeding, and in any appeals that may be taken from any judgments or orders entered therein, and shall execute all pleadings, bonds or other instruments, but at the sole expense of SOCIETY, that may be required in order properly to defend and resist any such action or proceeding, and prosecute any appeals taken therein. In the event of the service upon LICENSEE of any notice, process, paper or pleading under which a claim, demand or action is made or begun against LICENSEE on account of the performance on LICENSEE'S local radio programs of any musical composition (other than a "cleared composition") contained in the repertory of SOCIETY but not heretofore or hereafter during the term hereof copyrighted, composed or written by members of SOCIETY and not certified by SOCIETY as a musical composition copyrighted, composed or written by members of SOCIETY, SOCIETY agrees at the request of LICENSEE to cooperate with and assist LICENSEE in the defense of any such action or proceeding, and in any appeals that LICENSEE may elect to take from any judgments or orders entered therein.

B. As used in this Paragraph "9", a "cleared composition" shall mean any composition in the repertory of SOCIETY, not copyrighted, composed or written by a member of SOCIETY, which SOCIETY shall have notified LICENSEE is a composition with respect to which SOCIETY is willing to indemnify LICENSEE, provided that the performance of such composition shall be made on the specific local radio program of LICENSEE for which a clearance shall have been given by SOCIETY; provided further, however, that in the event that SOCIETY notifies LICENSEE in writing that it is willing to clear such a composition without limitation to a specific program, such composition shall thereafter be regarded as a "cleared composition" until such time as SOCIETY shall rescind such clearance.

C. For the purpose of this Paragraph "9" only, any musical composition (other than a musical composition or group of musical compositions expressly excepted therefrom or that may be restricted because of the operation of Paragraph "4" hereof) which is listed in the bound volumes entitled "ASCAP Index 1963" as the same may have been revised heretofore or as the same may hereafter be revised, as a musical composition heretofore copyrighted by a present member of SOCIETY shall be deemed to be included in the repertory of SOCIETY. SOCIETY shall have the right to make reasonable revisions in such Index from time to time, provided, however, that no such revision and no exception referred to above shall be effective as to any broadcast of LICENSEE'S local programs made, or delayed or repeat broadcasts thereof scheduled, prior to the date on which LICENSEE shall have received notice of such revision or exception. Nothing in this Sub-paragraph "C" shall be deemed to limit LICENSEE'S rights or to limit or affect LICENSEE'S obligations to pay the license fees payable under this agreement or to limit SOCIETY'S obligations to indemnify as provided in Sub-paragraph "A" of this Paragraph "9".

D. The provisions contained in Paragraph "9" shall apply to LICENSEE'S sponsors and their advertising agencies, and its or their artists, as to LICENSEE'S local radio programs with the same effect as if in each instance there had been added to "LICENSEE" the words "its sponsors and their advertising agencies, its and their artists, and each of them".

10. SOCIETY agrees during the term hereof to maintain for the service of LICENSEE substantially SOCIETY'S present repertory of compositions copyrighted, composed or written by present members of SOCIETY. In case there shall be a substantial diminution, by reason of action by SOCIETY or any such members, in the use which LICENSEE may make of compositions copyrighted, composed or written by such members of SOCIETY as compared to the use which LICENSEE customarily has been permitted to make of such compositions prior to the actual execution of this agreement or in case there shall be a substantial diminution in SOCIETY'S present repertory of compositions copyrighted, composed or written by present members of SOCIETY, LICENSEE may give SOCIETY thirty (30) days' notice in writing to cure such substantial diminution. In the event that such substantial diminution in use or repertory has not been cured within said thirty (30) days, LICENSEE may then promptly terminate this agreement. If LICENSEE does not so terminate, LICENSEE shall have the right to obtain a reduction, as hereinafter provided, in the percentage payable on its "net receipts from sponsors after deduction" proportionate to such substantial diminution in use or repertory.

In the event that (a) such a substantial diminution in use or repertory shall have occurred and LICENSEE shall have notified SOCIETY thereof, and (b) SOCIETY shall not have cured such diminution within thirty (30) days thereafter, and (c) SOCIETY and LICENSEE shall be unable to agree within such thirty (30) days either as to the existence of such a diminution as would justify a decrease in the license fees payable hereunder or as to the appropriate reduction in the percentage payable on LICENSEE'S "net receipts from sponsors after deduction" by reason of such diminution, and (d) LICENSEE shall not have terminated this agreement as herein provided, the controversy shall be determined by arbitration as herein provided.

In the event that such a substantial diminution in use or repertory shall have been determined to exist as herein provided and thereafter SOCIETY shall have cured such diminution, SOCIETY shall have the right to obtain, as herein provided, the restoration of any reduction theretofore made in the license fees payable under this agreement by reason of such diminution. In the event that SOCIETY shall notify LICENSEE that in SOCIETY'S opinion any substantial diminution in use or repertory shall have been cured and within thirty (30) days thereafter SOCIETY and LICENSEE shall be unable to agree as to whether or not such diminution shall have been cured, the controversy shall be determined by arbitration as herein provided.

Any award of the arbitrators with respect to any controversy submitted to arbitration under this Paragraph "10" and reducing or restoring the percentage payable by LICENSEE hereunder shall be effective as of whichever shall be the later of (a) the date on which LICENSEE or SOCIETY, as the case may be, shall have given the other notice of such substantial diminution in use or repertory or the curing thereof, or (b) the date, if any, which the arbitrators shall specify as the date on which such diminution occurred or was cured.

In case any controversy is to be determined by arbitration as provided above, such arbitration shall be conducted under and pursuant to the laws of the State of New York, in accordance with the provisions of Paragraph "11" hereof.

In case the arbitrators shall determine that there has been such a substantial diminution in use or repertory and shall make an award reducing the percentage payable by LICENSEE on its "net receipts from sponsors after deduction", the reduction in such percentage payable by LICENSEE made by such award shall in no event be greater than the participation in such percentage payments of the publisher member or members of SOCIETY whose catalogue or catalogues shall have been the subject of such substantial diminution in use or repertory. The participation of such publisher member or members in such percentage payments made by LICENSEE hereunder shall be deemed to be the same percentage of such payments by LICENSEE as the percentage which such publisher member's or members' income from SOCIETY in respect of radio distribution for the year immediately preceding shall bear to the entire distribution of royalties in respect of radio by SOCIETY to all of its publisher members during such year.

11. In the event that during the term of this agreement there is to be determined by arbitration hereunder whether there has been such a substantial diminution in use or repertory and, if so, the percentage by which the license fees payable hereunder shall be reduced by reason thereof, or whether a substantial diminution has been cured, as the case may be, as provided in Paragraph "10", each party shall on written notice to the other appoint an arbitrator within two (2) weeks after the expiration of the applicable thirty (30) day period specified in Paragraph "10" hereof.

In the event that within ten (10) days after the giving of such notice by one party, the other shall not by written notice appoint another arbitrator, then upon the written request of either party (or both) the person who is at the time performing the functions of President of the American Arbitration Association shall appoint the second arbitrator. When two arbitrators have been appointed they shall, if possible, agree upon a third arbitrator and shall appoint him by notice in writing, in triplicate, signed by both of them, one of which triplicate notices shall be given to each party hereto. If ten (10) days shall elapse after the appointment of the second arbitrator

without notice of the appointment of the third arbitrator having been given, then upon the written request of either party (or both) the person who is at the time performing the functions of President of the American Arbitration Association shall appoint the third arbitrator. Upon appointment of the third arbitrator the three arbitrators shall hold a hearing and give opportunity to each party hereto to present his case in the presence of the other, and shall then make their award determining the license fees which shall be paid by LICENSEE to SOCIETY, taking into consideration all applicable factors which tend to determine whether there has been such a substantial diminution and, if so, the extent thereof and the percentage by which the license fees payable hereunder shall be reduced by reason thereof, or whether a substantial diminution has been cured, as the case may be, as provided in Paragraph "10". The arbitration shall be conducted in accordance with the rules of the American Arbitration Association then in effect.

The award of the majority of the arbitrators shall be binding upon the parties hereto, judgment may be entered thereon in any court having jurisdiction, and this agreement shall be deemed to be modified accordingly. Such award shall include the fixing of the expenses of the arbitration, which shall be borne equally by both parties.

12. In the event of the termination or suspension of the governmental licenses covering the Station or any substantial alteration or variation of the terms and conditions thereof, or any major interference with the operations of the Station due to governmental measures or restrictions, LICENSEE shall have the right to terminate this agreement upon seven (7) days' written notice.

13. In the event of:

(a) any major interference with the operation of SOCIETY in the state, territory, dependency, possession or political subdivision in which the Station is located, by reason of any law of such state, territory, dependency, possession or political subdivision; or

(b) any substantial increase in the cost to the SOCIETY of operating in such state, territory, dependency, possession or political subdivision, by reason of any law of such state, territory, dependency, possession or political subdivision, which is applicable to the licensing of performing rights,

SOCIETY shall have the right to terminate this agreement on thirty (30) days' written notice to LICENSEE.

14. All notices required or permitted to be given by either of the parties to the other hereunder shall be duly and properly given if mailed to such other party by registered or certified United States mail addressed to such other party at its main office for the transaction of business.

15. This agreement shall enure to the benefit of and shall be binding upon the parties hereto and their respective successors and assigns, but no assignment shall relieve the parties hereto of their respective obligations hereunder.

16. Attached hereto is a form of "local station per program radio license". By giving SOCIETY written notice thereof at least ninety (90) days prior to the commencement of the third contract year hereof, LICENSEE may substitute said local station per program radio license agreement in place hereof, in which event, effective with the commencement of the third contract year hereof, said per program radio license agreement shall be in full force and effect between LICENSEE and SOCIETY for the balance of the term of this agreement.

17. Attached hereto is a copy of a letter of interpretation dated March 1, 1967, which shall be deemed a part of this agreement.

IN WITNESS WHEREOF, this agreement has been duly executed by SOCIETY and LICENSEE this day of , 19 , as of the first day of March, 1967.

SEP 12 1967

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

By Louis G. Weber
EXECUTIVE

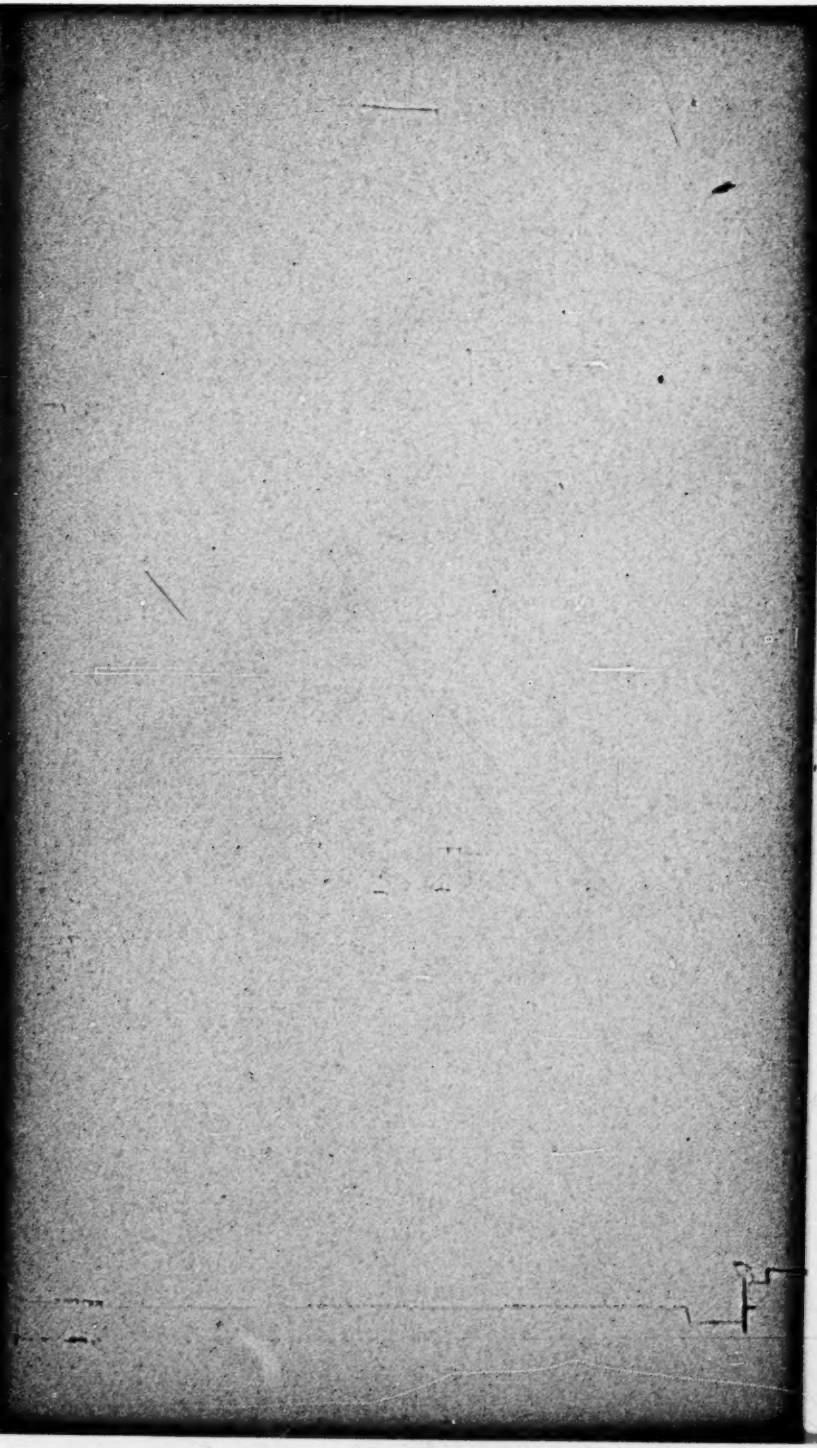
WKJF, INC.

Louis S. Schwadel
LICENSEE Treasurer

By _____

SEP 11 1967

IBM 6-67 (C)



Supreme Court, U. S.
FILED
OCT 18 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-452

TWENTIETH CENTURY MUSIC CORPORATION and MARY M. BOURNE,

Petitioners,

v.

GEORGE AIKEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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I. FRED KOENIGSBERG

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H.R. 2512, 90th Cong., 1st Sess. §§110(5), 111 (1967) 16

S. 1361, 93rd Cong., 2d Sess. §§110(5), 111 (1974) 16

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Stern & Gressman, Supreme Court Practice (1969) 11

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-

TWENTIETH CENTURY MUSIC CORPORATION
and MARY M. BOURNE,

Petitioners,

v.

GEORGE AIKEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners Twentieth Century Music Corporation and Mary M. Bourne ask that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on June 21, 1974.

Opinions Below

The opinion of the Court of Appeals, not yet officially reported, is annexed hereto as Appendix A. The opinion of the United States District Court for the Western District of Pennsylvania is reported at 356 F. Supp. 271 (1973), and is annexed hereto as Appendix B.

Jurisdiction

The judgment of the Court of Appeals (Appendix C) was entered on June 21, 1974. On September 11, 1974, Mr. Justice Brennan extended the time to file this petition until October 18, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). Jurisdiction in the District Court was based on 28 U.S.C. §1338.

Questions Presented

Over 5,000 commercial establishments entertain their customers and employees with radio music sent over loudspeakers and are licensed and agree to pay nearly one-quarter million dollars each year to the composers, authors and music publishers of these copyrighted musical compositions. They do so because in 1931, in a unanimous opinion by Mr. Justice Brandeis, this Court held that when a commercial establishment makes available to its customers musical compositions transmitted by a broadcaster through the instrumentality of a radio receiver and loudspeakers installed by the establishment and wholly under its control, it "performs" those compositions publicly for profit within the meaning of Section 1 of the Copyright Act of 1909, now 17 U.S.C. §1(e). *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931).*

The court below refused to apply this Supreme Court decision on identical facts (except that the establishment

* Another two million dollars in license fees are paid by background music operators like Muzak who service some 75,000 additional commercial establishments—arrangements that might be jeopardized were radio broadcast music available free of any license obligation.

was a restaurant rather than a hotel), on the ground that two recent decisions of this Court, *Fortnightly Corp.* v. *United Artists,* 392 U.S. 390 (1968), and *Teleprompter Corp.* v. *CBS,* 415 U.S. 394 (1974), had, albeit without saying so, consigned *Jewell-LaSalle* to the dustbin of history. In so doing, the court below misconstrued *Fortnightly* and *Teleprompter,* undermined an important rule of law established four decades ago and jeopardized the material well-being of America's composers, authors and music publishers who have come to depend upon the business relationships that have evolved in reliance upon *Jewell-LaSalle.*

The questions presented are as follows:

1. Should not this Court protect the integrity of its unanimous decision in *Jewell-LaSalle,* which, although "confined to its facts" in recent years by a majority of this Court, has not been overruled?

2. Should not *Fortnightly* and *Teleprompter* be construed in the context of the new industry (CATV) out of which those decisions arose, and not unnecessarily extended to the music world in a way that would disrupt important business relationships that have evolved in fair and reasonable reliance upon *Jewell-LaSalle*?

3. Where the ultimate question is whether there has been a "performance," must the conclusion reached for those like CATV systems who do little more than enhance signals received on a viewer's own television set in the privacy of his own home, be ruthlessly applied to commercial establishments that use loudspeakers to exploit radio broadcasts to satisfy and entertain customers and employees in such public places as hotels and restaurants?

4. When a restaurant owner provides music by means of a radio and loudspeakers to enhance the atmosphere of his establishment and entertain customers and employees, are not these acts the equivalent of providing music by records, tapes, background music services or live orchestras, and therefore a "performance" under the "functional" test enunciated by this Court in *Fortnightly* and *Teleprompter*?

5. If it has been, since 1931, a "performance" within the meaning of the Copyright Act for a commercial establishment to receive radio broadcasts of copyrighted musical compositions and to entertain customers with them over loudspeakers under its control; if a vital industry has grown up in the past 40 years in legitimate reliance upon that ruling; and if Congress has not only repeatedly declined to reject that rule but has incorporated it in major proposed revisions to the copyright laws, is it not still a "performance" for a commercial establishment to do the same thing today?

6. To the extent that this Court spared the new CATV industry copyright liability because it did not want to upset the economic status quo by exposing it retroactively to a burden not previously borne, should not this Court reach a different result with respect to music, where there are long-established practices that have developed in good faith reliance upon the proposition that commercial establishments *are* liable for copyright infringement when they receive copyrighted musical compositions broadcast by others and make them available to their customers and employees over loudspeakers?

Statute Involved

Section 1 of the Copyright Act, 17 U.S.C. §1, provides in pertinent part:

> "§1 Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:
>
> * * *
>
> (e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpuse of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced. * * * And as a condition of extending the copyright control to such mechanical reproductions, that whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of 2 cents on each such part manufactured, to be paid by the manufacturer thereof. * * * The payment of the royalty provided for by this section shall free the articles or devices for which such royalty has been paid from further contribution to the copyright except in case of public performance for profit. * * *"

Statement of the Case

Respondent George Aiken owns and operates a chain of fast food restaurants in Pittsburgh, Pennsylvania. On March 11, 1972, customers and employees in one of his restaurants were entertained by renditions of two popular

musical compositions: "The More I See You," whose copyright proprietor is petitioner Twentieth Century Music Corporation, and "Me and My Shadow" whose copyright proprietor is petitioner Mary M. Bourne.

These two songs were broadcast that day by Pittsburgh radio station WKJF-FM, a licensee of the American Society of Composers, Authors and Publishers ("ASCAP"), of which organization petitioners are members.* The broadcasts were received upon a radio receiver in Aiken's establishment and transmitted over five loudspeakers. It was Aiken's practice to turn his receiver on each morning and thus to entertain his customers and employees throughout the day.

Some 5,150 similar establishments employing radio receivers and loudspeakers to entertain customers and employees are licensed by ASCAP to perform the entire repertory of music whose copyrights are held by ASCAP members. The cost of such a license for Aiken's establishment is $5 a month. The same license that permits the use of radio music also authorizes the use of tapes and recorded music without additional payment. Another 75,000 establishments use background music whose purveyors such as Muzak are licensed by ASCAP to provide such

* ASCAP was organized in 1914 as a non-profit unincorporated association—essentially a cooperative of authors, composers and music publishers—to prevent piracy and to license performing rights of its members' musical compositions. The amended final judgment in *United States* v. *ASCAP*, 1950 Trade Cases ¶62,595, requires that its fees be reasonable, nondiscriminatory and uniform, and provides a simple judicial remedy for a party who questions the reasonableness of the ASCAP rates. Since 1941 ASCAP's licenses with broadcasters have expressly negated any right on the part of the broadcaster to license receivers of a broadcast to perform publicly for profit.

music by wire or multiplex FM.* License agreements of the kind described have been continually in effect since 1941 as a result of negotiations between ASCAP, the broadcasting industry and commercial users of copyrighted music.

The District Court found that these long established business relationships yield $2,346,000 annually in fees to ASCAP for its member composers, authors and music publishers—$246,000 paid by those using radios and loudspeakers, and $2,100,000 from the Muzak-type licenses.

Petitioners brought suit in the United States District Court in the Western District of Pennsylvania to restrain Aiken's infringement of their copyrights and for the $250 statutory penalty. The trial court granted the monetary relief sought. It found that Aiken had done precisely that which this Court held in *Jewell-LaSalle* was a public "performance" for profit requiring a license. It found that failure to follow this Court's 1931 decision would jeopardize established business relationships that had developed in legitimate reliance upon that decision; commercial establishments would discontinue paying license fees to use broadcast music, and the fees which Muzak and similar services now pay for their rights might be adversely affected. The District Court held that a contrary result was not required by this Court's decision in *Fortnightly Corp.* v. *United Artists,* 392 U.S. 390 (1968). It noted that

* Although the decision below does not directly affect the Muzak-type licenses, Muzak and its franchisees did assert the position below that they will seek a substantial fee reduction if *Jewell-LaSalle* is overruled on the theory that establishments would not pay as much for background music as they do now if they can obtain free radio music.

this Court had discussed *Jewell-LaSalle,* but had declined to overrule it, and that whereas the present plaintiffs sought to protect long established business relationships, the *Fortnightly* plaintiffs sought to impose a new kind of liability upon a new industry.

The United States Court of Appeals for the Third Circuit reversed. It did not dispute that *Jewell-LaSalle* appeared to require affirmance of the trial court's decision. Indeed, it conceded that the trial court "was faced with an 'all fours' decision in" *Jewell* v. *LaSalle.* (App. A, p. 17). But it held that *Fortnightly,* as amplified in *Teleprompter Corp.* v. *CBS,* 415 U.S. 394 (1974), changed the meaning of the word "performance" even where *Jewell-LaSalle* previously governed, and that under *Fortnightly* and *Teleprompter,* what Aiken did in his restaurant was no longer a "performance" within the meaning of the Copyright Act.

Reasons for Granting the Writ

I. The decision below conflicts directly with a unanimous decision of this Court.

A. The court below expressly refused to follow a unanimous decision of this Court.

As the court below conceded, the present case is on "all fours" with *Jewell-LaSalle.* (App. A, p. 17). The only difference is that this one involves a restaurant whereas *Jewell-LaSalle* involved a hotel.* In *Jewell-La-*

* The trial court here found as a fact that the rule in *Jewell-LaSalle* had been consistently applied to restaurants as well as hotels for over 30 years, and that both kinds of establishments had routinely entered into licenses with ASCAP since 1941, despite contrary intimations in *Nimmer on Copyright* §107.41, n. 204 (1968), cited in *Fortnightly,* 392 U.S. at 405, n. 3. (App. B, p. 6)

Salle a unanimous court, speaking through Mr. Justice Brandeis, held in response to a certified question that there was a "performance" within the meaning of Section 1 of the Copyright Act of 1909 when a commercial establishment made available to its customers copyrighted musical compositions by means of a radio receiver and transmitted through loudspeakers installed by the establishment and wholly under its control. Those are the facts here.

The two cases cannot be distinguished, as respondent's counsel have suggested, on the ground that in *Jewell-LaSalle* the broadcaster was itself unlicensed. Mr. Justice Brandeis indicated that this fact eliminated from the case the issue of whether there was an implied license for the benefit of the receiver. Since 1941, the form of license used by ASCAP expressly negates that possibility. In any event, the question certified in *Jewell-LaSalle* was whether certain acts constituted a "performance" within the meaning of the Act—a question wholly unrelated to whether there was a license or an implied license.

If *Jewell-LaSalle* remains the law—even if only upon its own facts—the decision of the Court of Appeals is erroneous and the decision of the trial court must be reinstated.

B. This Court has not overruled its unanimous decision in *Jewell-LaSalle*.

In attempting to adapt the language of the Copyright Act of 1909 to the novel technological circumstances presented by the CATV television industry, a majority of the members of this Court in 1968 felt constrained to fashion a fuctional test of "performance" as applied to this new

technology. In *Fortnightly Corp.* v. *United Artists*, the question was whether there was a "performance" within the meaning of the Act when a CATV system intercepted a television signal and functioned as an antenna, enhancing its subscribers' ability to receive that signal on their own television receivers in the privacy of their own homes. The CATV industry was a new one. It had never recognized any obligation to pay license fees to the copyright proprietors of the materials intercepted; not one cent had ever been paid by the CATV industry to a copyright proprietor. 392 U.S. at 401 n. 30.

At issue, as this Court expressly recognized, was whether such liability should newly be established and applied retroactively. The Court declined to extend the rationale of *Jewell-LaSalle* to these new facts; indeed, it said that the 1931 landmark "must be understood as limited to its own facts." 392 U.S. at 397 n. 18. For purposes of determining CATV liability, it concluded that the question was whether CATV was "functionally" more like the "passive" viewer than the "active" broadcaster. So defining the problem, it ruled against liability.

In effect, *Fortnightly* resolved the issue in favor of the economic status quo—freezing the present situation in which CATV was totally outside the copyright system. Mr. Justice Fortas dissented. Three members of the Court, Justices Douglas, Marshall and Harlan, did not participate.

In 1974 the Court was asked to decide whether the rationale of *Fortnightly* reached other facets of CATV operations, and once again it resolved the matter in favor of the economic status quo. The new case, *Teleprompter*

Corp. v. *CBS,* involved interception of distant signals not otherwise receivable by subscribers on their own sets in their own homes. A majority of the Court, the Chief Justice and Justices Douglas and Blackmun dissenting, resolved the question in favor of the CATV industry, which had still not paid any license fees to copyright proprietors. Once again, the Court chose not to disrupt existing economic patterns—leaving to Congress the question whether to create liability where before there had been none. Once again, *Jewell-LaSalle* was not overruled; it was simply not applied to these aspects of the CATV industry.

No member of this Court has ever asserted that *Jewell-LaSalle* should be overruled insofar as it applies to the reception of radio signals in a commercial establishment which makes those signals available to customers and employees over loudspeakers. No Justice has ever written that composers, lyricists and music publishers should go unpaid when hotels and restaurants exploit their copyrighted compositions for profit-making purposes. It was, therefore, the duty of the court below to honor *Jewell-LaSalle.* Only this Court has the power and the responsibility to overrule its prior decisions. It is an established purpose of the certiorari jurisdiction to confine lower courts to their proper function and to reserve to this Court the power to overrule. A writ should be granted for that purpose. Sup. Ct. Rule 19(1)(b); Stern & Gressman, Supreme Court Practice §4.5, pp. 158-159 (1969).

II. The court below misconstrued this Court's decisions in *Fortnightly* and *Teleprompter*.

This Court's cable decisions do not compel the conclusion that Aiken did not publicly "perform" for profit petitioners' copyrighted compositions. Unlike the facts in the cable cases, where each subscriber owns his own television set and the cable systems merely enhance the capacity of those private sets to receive—in the privacy of the subscriber's own home—programs broadcast by television stations, none of the members of the public present in Aiken's restaurant was listening to his own radio. Instead, Aiken had installed a radio and loudspeakers for the purpose of making his restaurant more attractive for his patrons as a place to eat and for his employees as a place to work. By installing and controlling his own radio equipment and loudspeakers in order to enhance the atmosphere of his restaurant, Aiken functioned as an "active" public performer; his role was functionally equivalent to that of a proprietor of a restaurant or hotel who plays records or tapes, subscribes to a background music service, or hires an orchestra to play copyrighted compositions. These functions clearly entail liability for copyright infringement. See *Chappell & Co.* v. *Middletown Farmers Market & Auction Co.*, 334 F. 2d 303 (3rd Cir. 1964) (records); *Leo Feist, Inc.* v. *Lew Tendler Tavern, Inc.*, 267 F. 2d 495 (3rd Cir. 1959) (background music service); and *Herbert* v. *Shanley Co.*, 242 U.S. 591 (1917) (use of a live orchestra).

In no event should an unreviewed decision of a federal appellate court be permitted to cut such a wide swath

through copyright law on the basis of an overblown application—indeed, a misapplication—of *Fortnightly* and *Teleprompter*.

III. Because long established business relationships have developed in full and fair reliance on this Court's decision in *Jewell-LaSalle*, its viability should not be destroyed without plenary review in this Court.

A. The decision below, if unreviewed, will disrupt important reliance interests.

The trial court found, and the record establishes without contradiction, that significant economic interests have developed in legitimate reliance upon this Court's decision in *Jewell-LaSalle*. If the decision below stands, the 5,150 establishments that have agreed to pay a modest monthly license fee to entertain their patrons with copyrighted music would have no reason to continue paying those fees. Authors, composers and publishers would thus be deprived of a quarter million dollars each year which they receive through ASCAP. Moreover, as the trial court found, arrangements whereby 75,000 commercial establishments now use ASCAP licensed background music yielding over $2 million in license fees might also be jeopardized; the background music operators asserted below that their subscribers would find little reason to pay for their music when similar music broadcast by radio could be freely used for the entertainment of customers.* The

* The trial court explained, 356 F. Supp. at 273, that Muzak, its franchisees and other background music operators have pending a request to modify fees before the court administering the ASCAP decree (the decree provides that where the parties cannot agree on fees, the court will set them), and that a decision in this case adverse to ASCAP might have an effect upon the fee level. (App. B, p. 4).

trial court found, and the record establishes, that since *Jewell-LaSalle*, complicated contractual arrangements have evolved under which commercial establishments using music to entertain customers and employees have paid millions of dollars in license fees to the artists who created that music. (App. B, pp. 3-4). Indeed, Muzak asserted below that the decision in this case will

> "in significant measure influence the price the public pays for background music whatever the source." (App. A, p. 5).

B. *Jewell-LaSalle* should be adhered to in order to vindicate these reliance interests.

First, as argued above, there is a great difference in the normal function served by CATV (boosting signals and transmitting them to a viewer's own set, to be seen in the privacy of his own home) and the function served by hotel keepers and restaurateurs who use radio music over loudspeaker systems to please and entertain customers and employees in such public places as hotels and restaurants. In the latter context, *Jewell-LaSalle* was and remains correct.

Second, it would be no anomaly were this Court to hold that the word "performance" may have one application with respect to CATV and another with respect to copyrighted musical compositions received on radios and carried by loudspeakers throughout public establishments. It has been this Court's policy, when economic interests develop in fair and reasonable reliance upon decisions of this Court, honorably to vindicate that reliance interest while remaining free to apply other interpretations to other industries. Compare what might be termed the "grandfather" treatment afforded baseball in *Flood* v. *Kuhn*, 407

U.S. 258 (1972), with that dealt to football in *Radovich* v. *National Football League*, 352 U.S. 445 (1957), to boxing in *United States* v. *International Boxing Club*, 348 U.S. 236 (1955), and to the theatre in *United States* v. *Schubert*, 348 U.S. 222 (1955). In music, as in baseball, the "slate is not clean," and has not been so for nearly half a century. Cf. *Flood* v. *Kuhn*, 407 U.S. at 283.

C. The history of congressional action supports adherence to *Jewell-LaSalle*.

It is particularly appropriate for this Court honorably to vindicate a reliance interest where a long history of congressional action provides support for the precedent relied upon. That is the case here. Since 1931 Congress has 19 times amended the Copyright Act, without overruling *Jewell-LaSalle*. In the years following *Jewell-LaSalle*, some 18 proposals to reverse its interpretation of the Copyright Act were introduced in Congress. None passed. Moreover, in recent years, Congress has fully accepted *Jewell-LaSalle* and incorporated its rationale in proposals to revise the copyright laws. Congress is presently considering a major overhaul of the copyright laws. Each major bill that has received any support in the Congress, including those bills that have passed either House, has carefully embodied the *Jewell-LaSalle* approach, as reflected in the contractual arrangements actually negotiated by ASCAP with the broadcast industry and with commercial establishments since 1941.

Bills drafted both before and after this Court's decisions in *Fortnightly* and *Teleprompter* provide that there *shall* be copyright liability when a commercial establishment receives copyrighted musical material upon a radio receiver and makes it available to customers and employ-

ees through loudspeakers. Consistent with ASCAP's long standing licensing practices,* the only commercial establishments free of liability under these bills are those—such as "Mom and Pop" stores—that employ single radio receivers like the ones used in ordinary homes without any additional loudspeakers. See, for example, Section 110(5) of H.R. 2512, passed by the House of Representatives in 1967 and Section 110(5) of S. 1361, which passed the Senate as recently as September 9, 1974. CATV, on the other hand, has been treated entirely separately—and quite differently—by Congress. See Section 111 of each of the aforementioned bills. Apparently the alleged "anomaly" that the court below could not accept makes sense to the lawmakers. There plainly is here, as there was in *Flood*, more than "mere Congressional silence and passivity," to support adherence to precedent. *Flood* v. *Kuhn*, 407 U.S. at 293.** Other instances in which this Court has relied upon congressional action or inaction as the basis for adhering to subsequently challenged rulings include *Canada Packers, Ltd.* v. *Atchison, T. & S. F. R. Co.*, 385 U.S. 182, 184 (1966) (Congress had not acted to overrule the Court); *Joint Industry Board* v. *United States*, 391 U.S. 224, 228-29 (1967) (the Court adhered to a 1959 decision where Congress has frequently amended the statute but has not enacted proposals to reverse the Court); *Walling* v. *Halliburton Co.*, 331 U.S. 17, 25 (1947) (Congress has let the decision stand and the parties "have regulated their affairs on the faith of it.")

* ASCAP has never required a license from establishments where a home-type radio receiver is used without being hooked up to a loudspeaker system.

** Indeed, whereas in *Flood* baseball had known for a quarter century that Congress might accept the Court's blunt invitation to strip it of antitrust immunity, in the present case there was no reason to believe after 1941 that either Court or Congress would repudiate *Jewell-LaSalle*.

Conclusion

The decision below not only purports to overrule a decision of this Court and misconstrues two other decisions, but it also threatens the economic health of music in America, not so hardy and resilient an industry as steel or electric power, but one of central importance to the Nation's cultural life. No one knows precisely what combination of factors makes for creativity in music, but the intricate financial arrangements that have grown up in the wake of *Jewell-LaSalle* no doubt play some part. Composers, authors and publishers must, after all, eat as well as make music. This Court should not lightly permit lower federal tribunals to discard unanimous Supreme Court decisions upon which our music-makers have fairly and reasonably come to rely for their economic well-being. A writ of certiorari should be granted to review the decision below.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1469

TWENTIETH CENTURY MUSIC CORPORATION
and MARY M. BOURNE,

Appellees,

v.

GEORGE AIKEN,

Appellant.

D. C. Civil Action No. 72-440

APPEAL FROM AN ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued November 6, 1973
Before: VAN DUSEN, HUNTER and GARTH, *Circuit Judges.*

(Filed June 21, 1974)

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GARTH, *Circuit Judge*

We are concerned here with an interpretation of the Copyright Act, 17 U.S.C. §1.[1] The District Court for the Western District of Pennsylvania held[2] that defendant in-

1. "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work;

(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art;

(c) To deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address or similar production, or other nondramatic literary work; to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, delivered, presented, produced, or reproduced; and to play or perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever. The damages for the infringement by broadcast of any work referred to in this subsection shall not exceed the sum of $100 where the infringing broadcaster shows that he was not aware that he was infringing and that such infringement could not have been reasonably foreseen; and

(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever; and

(e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced. * * *"

2. 356 F. Supp. 271 (W.D. Pa. 1973); Judgment entered March 26, 1973.

fringed two copyrighted musical compositions by performing them at defendant's restaurant publicly for profit.

The question presented for determination may be stated as: has defendant "performed" the plaintiffs' copyrighted musical compositions within the meaning of the Copyright Act 17 U.S.C. §1 when these compositions were made available to the defendant's patrons at his restaurant by the instrumentality of a radio and loud speakers?

I.

The defendant George Aiken owns and operates a fast service food establishment in downtown Pittsburgh. Food is sold at retail for both consumption on the premises and for "take-out" purposes. The premises can accommodate about 40 patrons at its counters and in its booths. A single radio connection to four separate loud speakers furnishes background music through normal radio programming. The speakers are located in the ceiling of the public and non-public areas of the establishment and the defendant's practice (in order to have normal radio broadcasts heard throughout the restaurant during business hours) is to switch the radio on at the opening of each business day. Whatever is broadcast over the radio, therefore, becomes audible in the restaurant, as no effort is made to exclude any portion of the broadcasts, *i.e.*, news, music, commercials, etc.

In accordance with the practice noted above, on March 11, 1972, the radio in the defendant's premises having been turned on, two copyrighted musical compositions were heard by at least six patrons in the restaurant.[3] On that date,

3. The two copyrighted musical compositions were: "The More I See You" and "Me and My Shadow". The copyright proprietor of "The More I See You" is the plaintiff-appellee Twentieth Century

radio station WKJF-FM broadcast the two musical selections which were heard at defendant's premises. WKJF-FM at that time was a licensee of The American Society of Composers, Authors and Publishers, (ASCAP) and therefore licensed to broadcast the two songs which formed the basis of the asserted copyright violation. The ASCAP license contained the following provision:

> "Nothing herein contained shall be construed as authorizing LICENSEE [WKJF-FM] to grant to others any right to reproduce or perform publicly for profit by any means, method or process whatsoever of the musical compositions licensed hereunder or as authorizing any receiver of any radio broadcast to perform publicly or reproduce the same for profit, by any means, method or process whatsoever."

Over the years ASCAP has licensed commercial establishments similar to George Aiken's when the establishment utilizes a radio and more than one speaker. As a matter of policy, however, ASCAP has not required a license where the commercial establishment has limited itself to a radio and one speaker. Presently ASCAP has license agreements with 5,150 businesses.[4] These agreements result in annual royalty payments of $246,000.

Music Corporation (hereinafter "Twentieth"); the copyright proprietor of "Me and My Shadow" is the plaintiff-appellee Bourne. Both Twentieth and Bourne are members of the American Society of Composers, Authors and Publishers (ASCAP), an association authorized to license the right of public performance of the copyrighted musical works in question.

While not directly relevant to the issues discussed in the text of this opinion, as a matter of general nostalgic interest the complaint recites that Mack Gordon and Harry Warren created and wrote "The More I See You", while Billy Rose (lyrics), Al Joelson and Dave Dreyer (music) created and wrote "Me and My Shadow".

4. Included in these businesses are firms which use radio as the source of music, as well as firms which employ on premises sources for music such as tape recorders and live entertainment.

Muzak Corporation filed a brief *amicus curiae* in this appeal. Muzak, in its brief, adopted that portion of the District Court's opinion which sets forth Muzak's interest as follows: "The Muzak franchisers sell to business firms 'background' music which is transmitted by wire from a single location within a given geographical area. Muzak is licensed by ASCAP at rates negotiated by the parties or if they are unable to agree, at levels set by the United States District Court for the Southern District of New York in accordance with the consent judgment entered on March 14, 1950[5] * * *. The Muzak organizations compete with FM radio stations for the background music market. A decision adverse to the plaintiff in the case at bar might have an effect on a pending request for reduction of licensing fees which has been filed by Muzak affiliates in the Southern District of New York." Muzak emphasizes that the decision here will "in significant measure influence the price the public pays for background music whatever the source."

The present plaintiffs complain that when George Aiken tuned his restaurant radio to WKJF-FM which was broadcasting plaintiffs' musical compositions, Aiken by that means had publicly performed these compositions for profit within the meaning of the Copyright Act 17 U.S.C. §1 et seq. The District Court agreed with the plaintiffs' contentions, and although it did not grant the injunction sought, it did enter judgment on March 26, 1973 in favor of each plaintiff for $250. It is that order from which the defendant appeals.

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5. The March 14, 1950 consent judgment amended an order dated February 26, 1941, in the case of United States v. American Society of Composers, Authors and Publishers, Civil Action No. 13-95.

II.

Our task here is to give content and meaning to the term "perform" within the context of the Copyright Act. As Mr. Justice Stewart wrote in *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968):

> "The Copyright Act does not give a copyright holder control over all uses of his copyrighted work. Instead, §1 of the Act enumerates several 'rights' that are made 'exclusive' to the holder of the copyright. If a person, without authorization from the copyright holder, puts a copyrighted work to a use within the scope of one of these 'exclusive rights', he infringes the copyright. If he puts the work to a use not enumerated in §1, he does not infringe." 392 U.S. at 393-395.[6]

In each instance, the answer to the question as to whether an infringement occurred depends on whether or not there was a "performance" within the meaning of the Act, since without a "performance" there can be no infringement. The issue was joined here by the plaintiffs asserting that Aiken "performed" the two musical pieces when he switched on his radio (with four loud speakers attached) and tuned to the station which was playing these compositions. If that act constituted a "performance", then the defendant Aiken infringed the two copyrights and we would then be obliged to affirm the judgment of the District Court. On the other hand, if by the act of tuning to WKJF-FM George Aiken did not "perform", then no

6. "The primary policy of the Copyright Act is to give the public maximum access to the author's work; a secondary purpose is to remunerate the copyright owner." Note, Cable Television and Copyright Royalties, 83 Yale L.J. 554, 557 (1974).

infringement occurred and the District Court erred in its opinion and judgment.[7]

The District Court recognized, as do we, that the Act itself does not define "performance". In construing that term the District Court looked primarily to the conflicting tests articulated by the Supreme Court in *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931) (upon which the plaintiffs rely) and to *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968), invoked by the defendant.[8]

Our analysis similarly begins with an examination of *Jewell-LaSalle* and *Fortnightly*. However, we need not halt our discussion with *Fortnightly* as the District Court was obliged to do. (See fn. 8 *supra*), as we can now draw upon the teaching of *Teleprompter Corp. et al.* v. *Columbia Broadcasting System, Inc., supra*, as it affects the issue before us.

III.

The Precedents Leading to Jewell-LaSalle

Although *Herbert* v. *Shanley Co.*, 242 U.S. 591 (1917) did not involve a radiocast and obviously not a telecast, it did set the stage for the later copyright cases concerned

7. Neither the plaintiffs nor the defendant argue with any conviction that the "tuning in" of the radio by the defendant so that it could be heard by patrons in the defendant's restaurant constituted a private as distinct from a public "performance". Nor do they contend seriously that if such be the case that the "performance" was not for profit.

8. At the time the District Court had this issue before it for resolution, the Supreme Court had not as yet announced its decision in Teleprompter Corp. et al. v. Columbia Broadcasting System, Inc., et al., decided March 4, 1974 and which we discuss at greater length in the latter portions of this opinion. Nos. 72-1628 and 72-1633, 42 U.S.L.W. 4323.

with "performance". The defendant hotel in *Herbert* employed an orchestra for the entertainment of its guests. During dinner, a copyrighted composition was played. It was held that this was a performance for profit within the meaning of the Copyright Act.

Thereafter in 1925 the unauthorized *broadcasting* of a copyrighted musical composition by a radio station was held to constitute an infringement of the statutory copyright. *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.*, 5 F.2d 411 (6th Cir. 1925).[9]

In the following year (1926), the concept of "performance" was further refined in *Jerome H. Remick & Co.* v. *General Electric Co.*, 16 F.2d 829. The District Court in that case posed the question as follows:

> "* * * [W]hether one who by means of the microphones 'picks up' another's unauthorized performance of a copyrighted musical composition and transmits it by radio from a broadcasting station maintained and operated to stimulate the sale of radio product is liable for infringement of copyright?"

The District Court found that the only distinction between the defendant's position in *General Electric* and the defendant's position in *American Automobile Accessories* was the fact that the General Electric Co. did not participate in the rendition of the musical production except by affording to others the opportunity to hear it. The Court held that the defendant had infringed the plaintiff's copyright stating:

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9. The Court specifically held that the mere fact that radio had not been developed at the time the Copyright Act was enacted, did not exclude radio broadcasts from the scope of the statute.

> "* * * [I]f he [the defendant] broadcasts without authority from the owner of the copyright a private rehearsal of a copyrighted production, thus converting the private rendition into a public performance for profit, he contributes to the resultant infringement."[10]

Buck v. *Debaum*, 40 F.2d 734 (S.D. Cal. 1929) followed the second *Remick* case. Debaum owned a cafe in Los Angeles. He had installed a radio receiving set through which he received various programs from broadcasting radio stations for the benefit of his patrons. He "tuned in" the cafe radio and in so doing, the copyrighted musical composition "Indian Love Call" was heard in the restaurant. The question there, was whether Debaum had been guilty of infringement of the copyrighted composition. The answer to that question focused (as it does here) on whether Debaum "performed" within the meaning of the Copyright Act. Holding that there had been no "performance" by Debaum, the Court said:

> "One who manually or by human agency merely actuates electrical instrumentalities, whereby inaudible elements that are omnipresent in the air are made audible to persons who are within hearing, does not 'perform' within the meaning of the Copyright Law. The performance in such case takes place in the studio of the broadcasting station, and the operator of the receiving set in effect does nothing more than one would do who opened a window and permitted the strains of music of a passing band to come within the inclosure

10. Interestingly, dictum in *General Electric Co.* suggests and anticipates the functional test adopted years later in *Fortnightly*: "* * * Certainly those who listen do not perform and therefore do not infringe. * * *" 16 F.2d at 829.

> in which he was located. It is true that it is the voluntary act of the person turning the dial on the receiving set that enables electricity to animate the mechanism so as to make audible within hearing distance of the receiving set that which is disseminated from the broadcasting station and which is 'on the air' by reason of the broadcast, but such voluntary action in my opinion is far from 'performing' the copyrighted work. The performance, which is licensed as just stated, occurs entirely in the studio of the broadcasting station where the copyrighted musical composition is lawfully used, and the action occurring at the receiving set is simultaneous therewith, and is in no sense a reproduction of the musical composition that is being lawfully performed at the broadcasting studio. The action, play, and use of the copyrighted composition has been completed within the studio."

40 F.2d at 735. The District Court in *Debaum* cited the District Court decision in *Buck* v. *Jewell-LaSalle Realty Co.*, 32 F.2d 366 (W.D. Mo. 1929), as authority for its decision.[11]

It was in this setting and with this background that *Buck* v. *Jewell LaSalle* was decided by the Supreme Court

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11. The authority of *Debaum* was therefore undercut when the Supreme Court in *Jewell-LaSalle* held that the defendant hotel had infringed the copyright by a "performance". Despite criticism by the dissent in *Fortnightly* (392 U.S. at 407 n.5), apparently some viability remains in the "authorized vs. unauthorized" broadcast distinction drawn in *Debaum* and referred to ni limiting fashion in the *Fortnightly* majority opinion (392 U.S. at 396 n.18). *But see* Society of European Stage Authors and Composers v. New York Hotel Stalter Co., 19 F. Supp. 1 (S.D. N.Y. 1937) discussed in the text of this opinion.

in 1931. The question certified by the Court of Appeals and answered "yes"[12] by the Supreme Court was:

> "Do the acts of a hotel proprietor, in making available to his guests, through the instrumentality of a radio receiving set and loud speakers installed in his hotel and under his control and for the entertainment of his guests, the hearing of a copyrighted musical composition which has been broadcast from a radio transmitting station, constitute a performance of such composition within the meaning of 17 U.S.C. Sec. 1 (e)?"

283 U.S. at 195-196. The argument was advanced that the mere act of "receiving" is not an act of "performance" by the one operating the receiving set. However, the Court found:

> "There is no difference in substance between the case where a hotel engages an orchestra to furnish the music and that where, by means of the radio set and loud speakers here employed, it furnishes the same music for the same purpose. In each the music is produced by instrumentalities under its control."[13]

283 U.S. at 201.

Society of European Stage Authors and Composers, Inc. v. *New York Hotel Statler Co., Inc.*, 19 F. Supp. 1 (S.D.

12. 283 U.S. at 202.

13. The defendant Jewell-LaSalle operated the LaSalle Hotel which maintained a master radio receiving set wired to each of the public and private rooms. Loud speakers or head phones were provided to the hotel's guests so that a program received on the master set could be simultaneously heard throughout the building. The plaintiff's copyrghted musical composition was broadcast by a radio station, received by the hotel and made available to its guests. The radio station was not licensed to broadcast the copyrighted work.

N.Y. 1937) followed *Jewell-LaSalle* both in time and in content. It was held there that the hotel had infringed a copyright when it "piped" to its guests' rooms a musical composition broadcast by a commercial radio station. The differences between *Jewell-LaSalle* and *Society* were in the physical arrangements for the receiving of the broadcast. In *Jewell* the programs were reproduced in the public rooms of the hotel as well as in the private guest rooms. In *Society* the master receiving sets of the hotel were connected only with the bedrooms and a guest in a particular room of the Hotel Pennsylvania could turn on the loud speaker and could select either of the two programs received by the two master receiving sets of the hotel. Significantly, in *Society* the broadcast was authorized, but the Court nevertheless held the plaintiffs' copyright to be infringed, stating:

> "[T]he reproduction by the hotel's master receiving sets of the electric impulses of the broadcast, and their distribution among its rooms so that all who wish may, by turning a knob, listen to the broadcast, is a public performance for profit of the broadcast program, and is made at the hotel's risk insofar as copyrighted musical compositions are concerned."

19 F.Supp. at 5-6.

IV.

Fortnightly Corp. v. United Artists Television, Inc.

The *Jewell-LaSalle* quantitative test[14] to determine "performance" was thereafter rejected in favor of a "func-

14. The "quantitative" label stemmed from the quantitative performance standard employed by *Jewell-LaSalle* and the cases which followed it, and can be defined as: "[H]ow much did the [infringer] do to bring about the viewing and hearing of a copyrighted work?" *See* Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. at 396. *See also* 392 U.S. at 396-7, n.18.

tional'' test in *Fortnightly*,[15] at least as regards cable television.

The Fortnightly Corp. owns and operates community antenna television (CATV) systems in two localities in West Virginia. Prior to 1957 there were no local television broadcasting stations in that area. After 1957, when two television stations were established, many residents of the area could still not receive broadcasts with ordinary rooftop antennas. This problem was solved by a number of the householders through utilization of Fortnightly's CATV service,[16] purchased at a flat monthly rate.

United Artists Television, Inc. is the copyright owner of several motion pictures. It granted licenses to the television stations in the West Virginia area to broadcast the motion pictures. Broadcasts were received by Fortnightly's CATV system and thence carried to its customers, despite the lack of authorization for such broadcast by United Artists. Fortnightly was thereupon sued for copyright infringement. United Artists contended that Fortnightly denied that the CATV systems ''performed'' the copyrighted motion pictures. The Court agreed with Fort-

15. *Fortnightly* is the first case to apply the Copyright Act to cable television (CATV). A discussion of CATV operations and systems can be found in United States v. Southwestern Cable Co., 392 U.S. 157, 161 *et seq.* (1968).

16. The Fortnightly system is described in the opinion as consisting of "antennas located on hills above each city, with connecting coaxial cables, strung on utility poles, to carry the signals received by the antennas to the home television sets of individual subscribers. The systems contain equipment to amplify and modulate the signals received, and to convert them to different frequencies, in order to transmit the signals efficiently while maintaining and improving their strength." 392 U.S. at 392. It is also noted in the opinion that some 10% of the CATV systems originate their own programs, but that type of programming was not dealt with by the Court.

nightly that no "performance" resulted from the CATV activities stating:

> "Television viewing results from combined activity by broadcasters and viewers. Both play active and indispensable roles in the process; neither is wholly passive. The broadcaster selects and procures the program to be viewed. He may produce it himself, whether 'live' or with film or tape, or he may obtain it from a network or some other source. He then converts the visible images and audible sounds of the program into electronic signals, and broadcasts the signals at radio frequency for public reception. Members of the public, by means of television sets and antennas that they themselves provide, receive the broadcaster's signals and reconvert them into the visible images and audible sounds of the programs. The effective range of the broadcast is determined by the combined contribution of the equipment employed by the broadcaster and that supplied by the viewer.
>
> The television broadcaster in one sense does less than the exhibitor of a motion picture or stage play; he supplies his audience not with visible images but only with electronic signals. The viewer conversely does more than a member of a theater audience; he provides the equipment to convert electronic signals into audible sound and visible images. Despite these deviations from the conventional situation contemplated by the framers of the Copyright Act, broadcasters have been judicially treated as exhibitors, and viewers as members of a theater audience. Broadcasters perform. Viewers do not perform. Thus, while

both broadcaster and viewer play crucial roles in the total television process, a line is drawn between them. One is treated as active performer; the other, as passive beneficiary.

When CATV is considered in this framework, we conclude that it falls on the viewer's side of the line. Essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's television set. It is true that a CATV system plays an 'active' role in making reception possible in a given area, but so do ordinary television sets and antennas. CATV equipment is powerful and sophisticated, but the basic function the equipment serves is little different from that served by the equipment generally furnished by a television viewer. If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be 'performing' the programs he received on his television set. The result would be no different if several people combined to erect a cooperative antenna for the same purpose. The only difference in the case of CATV is that the antenna system is erected and owned not by its users but by an entrepeneur." (footnotes omitted).

392 U.S. at 397-400.

In analyzing "performance," the majority (per Justice Stewart) stated that: "* * * mere quantitative contribution cannot be the proper test * * *." Instead, the resolution of the issue [of performance in the context of television broadcasting] depends upon a determination of the function that is played by CATV in the overall process of telecasting

and reception. Justice Fortas, writing in dissent, took the view that the majority had overruled *Jewell-LaSalle, supra* and *Society of European Stage Authors and Composers, supra.* The majority opinion on the other hand states that "* * * [t]he *Jewell-LaSalle* decision must be understood as limited to its own facts." 392 U.S. at 397 n.18. (*See* n.11, *supra*).

V.

Teleprompter in the Second Circuit

Following *Fortnightly,* the Second Circuit in 1973 held that the importation of "distant signals"[17] and their rebroadcast by CATV infringed the copyrighted material broadcasted. *Columbia Broadcasting System, Inc.* v. *Teleprompter Corp.,* 476 F.2d 338 (2d Cir. 1973). For our purposes, the significance of this decision is the application of the *Fortnightly* functional test in determining whether this rebroadcasting of "distant signals" constituted a "performance". Applying this test, the Court of Appeals held that no "performance" resulted when CATV systems merely retransmitted signals which were present in the air and within the range of ordinary (local) antennas. It concluded that no copyright liability could be imposed, even though the same programs could not have been received without the aid of CATV. The *Teleprompter* question that was not answered by *Fortnightly* was the question of

17. By means of a high powered antenna, CATV systems pick up radio signals present in the air and through various mechanical means, *see* fn. 16, *supra,* transform them into television pictures and sound. These signals are of two varieties. They may be able to be received within the range of ordinary (local) antennas or they may be "distant signals". "Distant signals" are signals which originate outside of the effective range of ordinary (local) antennas and are only available to the community through the use of CATV systems.

whether a "performance" resulted when the CATV system distributed signals that originated *beyond* the range of ordinary (local) antennas. In that situation the Second Circuit held that this activity was functionally equivalent to that of a "broadcast" and hence must be deemed to constitute "performance" within the meaning of the Copyright Act. In essence, therefore, *Teleprompter* found no "performance" within the original CATV range but found "performance" where relays were required.

It was in that setting that the District Court here was called upon to determine the instant controversy. On the one hand it was faced with an "all fours" decision in *Buck* v. *Jewell-LaSalle, supra.* On the other hand, it was faced with a CATV decision (*Fortnightly, supra*) which for all practical purposes rejected the quantitative test of *Jewell-LaSalle* and substituted in its place a functional test. The District Court opted to follow *Jewell-LaSalle,* holding that Aiken had "performed" within the meaning of the Copyright Act. In applying the quantitative test rather than the functional test, the District Court reasoned that had the Supreme Court intended to overrule *Jewell-LaSalle,* it would have done so expressly. 356 F.Supp. at 274.

VI.

Teleprompter in the Supreme Court

Much, if not all, of the force of the District Court's reasoning is dissipated by the Supreme Court's decision in *Teleprompter Corp.* v. *Columbia Broadcasting System, Inc.,* 42 U.S.L.W. 4323 (March 4, 1974).[18] The Supreme Court

18. Teleprompter Corp. v. Columbia Broadcasting System, No. 72-1628 was decided together with Columbia Broadcasting System, Inc. v. Teleprompter Corp., No. 72-1633, both on certiorari to the Second Circuit.

held, among other things, that the relay importation of distant signals does not constitute "performance" under the Copyright Act. It thereby reversed that portion of *Columbia Broadcasting System, Inc.* v. *Teleprompter Corp., supra* which defined "performance" in terms of "local" and "distant" signals. The Supreme Court also held that "performance" did not result from program origination,[19] sale of commercials or interconnection[20] of CATV systems.

Teleprompter's significance in the resolution of the issue before us is fourfold.

First: *Teleprompter* reaffirms the Fortnightly functional test.

Second: *Teleprompter*, as did *Fortnightly*, rejects unequivocally the quantitative test of *Buck* v. *Jewell-LaSalle*.[21]

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19. Program origination was expressly excluded from consideration in *Fortnightly*, 392 U.S. 392 n.6.

20. It was argued in *Teleprompter* that many CATV systems originated programs as contrasted with those programs received from broadcasters and rechannelled to subscribers. It was contended that such "original programming" results in a broadcast function and hence a "performance". Additionally it was argued that *Teleprompter* sells advertising time—a function normally attributed to broadcasters. Finally it was argued that the originating of a program by one CATV system and the sale of the right for redistribution of that program to another CATV system would constitute copyright infringement. These arguments were all rejected by the Supreme Court "* * * in none of these operations is there any nexus with the defendants' reception and rechannelling of the broadcasters' copyrighted materials." 42 U.S.L.W. at 4326.

21. Both appellant and appellees take heart from the fact that *Teleprompter's* majority opinion makes no mention of *Jewell-LaSalle*. The appellant regards this omission as further proof of its contention that *Jewell-LaSalle* has been overruled by *Fortnightly* and hence is no longer a "test", theory or case with which to be concerned. On the other hand, the appellees regard this lack of reference as a sign of continued validity of *Jewell-LaSalle* albeit in a restricted and narrow area. Realizing that we are anticipating our conclusion we nevertheless are obliged to agree with the appellant, that if Buck v.

Third: Despite the arguments advanced respecting (a) program origination; (b) sale of commercials; and (c) interconnection (*see n.*BJ *supra*), CATV systems were nevertheless committed to the "viewer" (as distinct from the "broadcaster") side of the line.

Fourth: Despite the advanced technology required for "local" signals (and even more so) for "distant" signals, the Supreme Court nevertheless held the reception and rechannelling of these signals a "viewer" function.

The Supreme Court stated:

> "In Fortnightly the Court reasoned that '[i]f an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be "performing" the programs he received on his television set,' 392 U.S., at 400, and concluded that '[t]he only difference in the case of CATV is that the antenna system is erected and owned not by its users but by an entrepreneur.' *Ibid.* In the case of importation of 'distant signals,' the function is essentially the same. While the ability or inclination of an individual to erect his own antenna might decrease with respect to distant signals because of the increased cost of bringing the signal to his home, his

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Jewell-LaSalle had retained any viability after *Fortnightly*, that viability no longer exists after the Supreme Court's decision in *Teleprompter*. As Justice Blackmun dissenting in part, stated:

> "I was not on the Court when Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968), was decided. Were that case presented for the first time today, I would be in full agreement with what Mr. Justice Fortas said in dissent. I would join his unanswered—and, for me, unanswerable—reliance on Mr. Justice Brandeis' unanimous opinion in Buck v. Jewell-LaSalle Realty Corp., 283 U.S. 191 (1931). But Fortnightly has been decided, and today the Court adheres to the principles it enunciated and to the simplistic basis* on which it rests." (*"Broadcasters perform. Viewers do not perform." 392 U.S., at 398 (footnotes omitted).) 42 U.S.L.W. at 4331.

> status as a 'non-performer' would remain unchanged. Similarly, a CATV system does not lose its status as a non-broadcaster, and thus a non-'performer' for copyright purposes, when the signals it carries are those from distant rather than local sources."
>
> * * *
>
> "Moreover, a CATV system importing 'distant' signals does not procure programs and propagate them to the public, since it is not engaged in converting the sights and sounds of an event or a program into electronic signals available to the public. The electronic signals it receives and rechannels have already been 'released to the public' even though they may not be normally available to the specific segment of the public served by the CATV system."

42 U.S.L.W. at 4327-4328.

In rejecting still another contention that the importation of "distant" signals should entail copyright infringement liability because of the deleterious impact of such retransmission upon the economics and market structure of copyright licensing, the Court said:

> "By extending the range of viewability of a broadcast program, CATV systems thus do not interfere in any traditional sense with the copyright holders' means of extracting recompense for their creativity or labor. When a broadcaster transmits a program under license from the copyright holder it has no control over the segment of the population which may view the program —the broadcaster cannot beam the program exclusively to the young or to the old, only to women or only to men—but rather he gets paid by advertisers on the basis of all viewers who watch the program. The use of CATV does not significantly alter this situation. Instead of basing advertising fees on the number of viewers within the range of direct transmission plus those who may receive 'local signals' via a CATV

system, broadcasters whose reception ranges have been extended by means of 'distant signal' CATV rechanneling will merely have a different and larger viewer market.[14] From the point of view of the broadcasters, such market extension may mark a reallocation of the potential number of viewers each station may reach, a fact of no direct concern under the Copyright Act. From the point of view of the copyright holders, such market changes will mean that the compensation a broadcaster will be willing to pay for the use of copyrighted material will be calculated on the basis of the size of the direct broadcast market augmented by the size of the CATV market.

These shifts in current business and commercial relationships, while of significance with respect to the organization and growth of the communications industry, simply cannot be controlled by means of litigation based on copyright legislation enacted more than half a century ago, when neither broadcast television nor CATV was yet conceived. Detailed regulation of these relationships, and any ultimate resolution of the many sensitive and important problems in this field, must be left to Congress." (footnotes omitted).

42 U.S.L.W. at 4328-4329.

Hence not only did the Supreme Court reemphasize the functional test announced in *Fortnightly,* but to the extent that it applied that test to "distant signals" and held that even these did not constitute "performance", it supports the position taken by the appellant here.[22] If Fortnightly, with its elaborate CATV plant and Teleprompter with its even more sophisticated and extended technological and

22. We find no distinction between the two technologies of radio and CATV which would require us to reach a different result than that reached in *Fortnightly* or *Teleprompter.* Neither of those opinions are limited to television or CATV. Indeed as we have previously noted, *Fortnightly* cited with approval Buck v. Debaum, *supra,* and *Debaum* was a "radio" case.

programming facilities were not "performing", then logic dictates that no "performance" resulted when the defendant Aiken merely activated his restaurant radio.

We hold, therefore, that mere extension of the range of audibility[23] of a broadcast program as "extended" here by the appellant Aiken, cannot be said to constitute "performance". The question asked at the outset of this opinion must therefore be answered "no".

The judgment of the District Court will be reversed and the District Court directed to enter judgment for the defendant.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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23. *See* Teleprompter Corp. v. Columbia Broadcasting System, Inc., 42 U.S.L.W. at 4328.

APPENDIX B

Opinion of the United States District Court

UNITED STATES DISTRICT COURT
W.D. PENNSYLVANIA

TWENTIETH CENTURY MUSIC CORPORATION and MARY M. BOURNE,

Plaintiffs,

v.

GEORGE AIKEN,

Defendant.

Civ. A. No. 72-440.

March 26, 1973.

William M. Wycoff, Thorp, Reed & Armstrong, Pittsburgh, Pa., Bernard Korman, Asst. Gen. Counsel, ASCAP, New York City, N. Y., for plaintiffs.

W. E. Frazier, Jr., Pittsburgh, Pa., for defendant.

Thomas N. Dowd, William S. D'Amico, Pierson, Ball & Dowd, Washington, D.C., amici curiae, on behalf of Business Music of Birmingham and others (Muzak).

OPINION

WEISS, District Judge.

Whether this is a "Jewell" of a case for the plaintiffs or a "Fortnightly" event for the defendant is the question to be resolved in this claim of copyright infringement, an alleged violation of 17 U.S.C. §1.

The defendant, George Aiken, owns and operates a chain of "fast service" food establishments in the Pittsburgh area, including one in the downtown section. This particular restaurant retails both take-out items and food for consumption on the premises, the latter category accounting for about 40 percent of the total food sold.

There are counters and booths on the premises which accommodate approximately 38 to 40 patrons. Musical background is presented by the use of a single radio set to which are connected 5 separate loudspeakers located in various places in the ceiling in the area used by customers as well as in the part of the premises occupied by the employees.

It is defendant's practice to have the normal programming audible in the restaurant throughout business hours, with no effort being made to exclude any part of the broadcasts. "Commercials," as well as news and musical programs, are heard in the establishment.

On March 11, 1972 the radio was tuned to Station WKJF-FM in Pittsburgh, Pennsylvania, and between 4:00 and 5:00 P.M. two copyrighted musical compositions, "The More I See You" and "Me And My Shadow" were broadcast through the multiple speakers in the ceiling. During that hour there were at least six patrons in Aiken's establishment at all times.

The plaintiff Twentieth Century Music Corporation is the copyright proprietor of the composition, "The More I See You." Plaintiff Mary M. Bourne is the copyright owner of "Me And My Shadow."

Both plaintiffs are members of the American Society of Composers, Authors and Publishers (ASCAP), an unincorporated association, which is authorized to license, on a

non-exclusive basis, the right of public performance of the copyrighted musical works in question.

Station WKJF-FM had been licensed to broadcast these two songs and others in the repertory of ASCAP by a written agreement containing a provision which disavowed any grant of authority to the radio station to permit performance for profit by other concerns.[1]

Since 1941, ASCAP has licensed commercial establishments, similar to the defendant's, where the ordinary radio set is supplemented by a number of additional loudspeakers. At the present time it has contractual relationships with 5150 business firms resulting in royalty payments of $246,000.00 annually. As a matter of policy no attempt has been made to require a license where a single standard radio set is used in small commercial establishments.

After the testimony in the case had been concluded, Business Music of Birmingham, Inc., et al. (Muzak franchisers) requested, and were granted permission to file a brief as an *amicus curiae*. The Muzak franchisers sell to business firms "background" music which is transmitted by wire from a single location within a given geographical area. Muzak is licensed by ASCAP at rates negotiated by the parties or if they are unable to agree, at levels set by the United States District Court for the Southern District of New York in accordance with a consent judgment entered on March 14, 1950, amending an Order dated February 26, 1941, in the case of United States v. American

1. Paragraph 1 of the contract reads in part: "Nothing herein contained shall be construed as authorizing LICENSEE to grant to others any right to reproduce or perform publicly for profit by any means, method or process whatsoever, any of the musical compositions licensed hereunder or as authorizing any receiver of any radio broadcast to perform publicly or reproduce the same for profit, by any means, method or process whatsoever."

Society of Composers, Authors and Publishers, Civil Action No. 13-95. That case had been filed against ASCAP to enjoin violations of the Sherman Antitrust Act and in part provides that ASCAP is to license, on request "* * * a radio broadcasting network, telecasting network, or wired music service (as illustrated by the organization known as 'Muzak') * * *."

The Muzak organizations compete with FM radio stations for the backgound music market. A decision adverse to the plaintiff in the case at bar might have an effect on a pending request for reduction of licensing fees which has been filed by Muzak affiliates in the Southern District of New York.

The facts in the case tried before this court are deceptively simple, but the legal problems engendered are difficult and complex. Fundamentally, the decision we are to make requires a choice between two Supreme Court cases which are logically inconsistent and which can co-exist only if confined to the specific technologies involved in each.

This situation comes about because the copyright law, enacted in 1909, did not foresee the capabilities of modern communications techniques and, despite many attempts, Congress has not yet been able to pass legislation, satisfactorily accommodating the conflicting interests of those most vitally concerned and the public as well.

The defense relies upon the more recent of the Supreme Court pronouncements, the case of Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 88 S.Ct. 2084, 20 L.Ed.2d 1176 (1968), and the plaintiffs invoke the earlier decision of Buck v. Jewell-La Salle Realty, 283 U.S. 191, 51 S.Ct. 410, 75 L.Ed. 971 (1931).

Fortnightly did not forthrightly overrule *Jewell-La Salle* and therein lies the difficulty.

Jewel-La Salle reflects the insistence of ASCAP that there was a performance for profit when a hotel owner furnished music to its guest rooms by means of loudspeakers or headphones which were wired to a master radio set in the building. The Supreme Court agreed and held that since complicated electrical instrumentalities were necessary to convert the radio waves into sound, the reception of a radio broadcast amounted to a reproduction of the original program and hence was a "performance".[2]

Fortnightly came to the Supreme Court in 1967, some 35 years later, presenting the same practical problem of applying to a new technology the copyright statute of an era totally unfamiliar with a modern communications device, specifically cable television or CATV, as it is called. In that case, the court rejected the reasoning of the earlier Brandeis opinion and decided that at least where CATV was concerned, those systems do not in fact broadcast or rebroadcast and that "* * * like viewers * * * do not perform the programs that they * * * carry".

In commenting upon *Jewell-La Salle,* the majority said in a footnote, *inter alia,* "[That] decision must be understood as limited to its own facts." (392 U.S. page 396, n. 18, 88 S.Ct. page 2088). Later, in discussing the dissent's criticism of failing to follow precedent, the majority referring to the earlier case, said:

> "But existing 'business relationships' would hardly be preserved by *extending a questionable* 35-year-old

2. The Jewell-La Salle case involved an unlicensed radio station but the same result was obtained with a licensed station in the case of Society of European Stage Authors & Composers, Inc. v. New York Hotel Statler Co., 19 F.Supp. 1 (S.D.N.Y. 1937).

> decision that in actual practice has not been applied outside its own factual context, post [392 U.S.], at 405 [8 S.Ct. at 2091] n. 3, so as *retroactively* to impose copyright liability where it has never been acknowledged to exist before. See n. 18(supra." (Page 401, n. 30, 88 S.Ct. page 2090, emphasis supplied).

Even in the context of dealing with the technology involved, the court cautioned—"While we speak in this opinion generally of CATV, we necessarily do so with reference to the facts of this case." (Page 399, n. 25, 88 S.Ct. page 2089).[3]

A casual reading of *Fortnightly* and the application of logic, as generally used in judicial decisions, would seem to require a finding for the defendant in this case, but we are persuaded on deeper consideration that a contrary result should obtain.

We come to this conclusion based on these factors:

1. If the Supreme Court had meant to overrule *Jewell-La Salle,* it would have said so.

2. Existing business relationships do exist as a result of a policy of ASCAP which it has followed since 1941 and, consequently, this is not a retroactive imposition of copyright liability.[4]

---

3. The Court of Appeals for the 2nd Circuit in the recent decision of Columbia Broadcasting System, Inc. v. Teleprompter Corp., 476 F.2d 338 (1973) held that when CATV distributes signals beyond the range of local antennas, a "performance" is involved.

4. Herman Finkelstein, a witness for ASCAP, disputes the comment in Nimmer (Copyright §10741, note 204, 1968) that licenses have not been required from commercial establishments such as bars and restaurants which operate radio sets for the amusement of the customers. See the reference to this text in the Fortnightly dissent, page 405, n. 3. We credit the testimony of Mr. Finkelstein that Nimmer is incorrect and that ASCAP has in fact been requiring licenses in many of the situations.

3. These existing business relationships are presently being governed, apparently satisfactorily, by the court in the Southern District of New York under the terms of the consent judgment. While copyright and antitrust are different, of course, there is an obviously close connection because copyright is, after all, a form of monopoly.

4. Consistency between the treatment of copyright as it applies to CATV and radio is not necessarily the just or only solution. *Cf.* Flood v. Kuhn, 407 U.S. 258, 92 S.Ct. 2099, 32 L.Ed.2d 728 (1972).

5. Preservation of the status quo until such time as Congress can intelligently deal with the problem in all its dimensions is more apt to accomplish substantial justice than the reversal of a practice which has been in operation for more than 30 years.

We have much less difficulty in concluding that the facts in this case demonstrate a performance for "profit." The background music, according to the defendant, is primarily to enable the employees to perform their work in a more relaxed state of mind and, hence, more efficiently. Pleasure to the customers is considered only a secondary benefit. Either factor would be sufficient to comply with the decisional law in this field and when both are present, it appears to be an *a fortiorari* situation. *See* Herbert v. Shanley Co., 242 U.S. 591, 37 S.Ct. 232, 61 L.Ed. 511 (1917); Chappell & Co. v. Middletown, 334 F.2d 303 (3rd Cir. 1964); Leo Feist, Inc. v. Lew Tendler Tavern, Inc., 267 F.2d 494 (3rd Cir. 1959).

Accordingly, judgment will be entered in favor of the plaintiffs and against the defendant.

ORDER

And now, to-wit, this 26th day of March, 1973, Judgment is entered against the defendant and in favor of plaintiff, Twentieth Century Music Corporation, in the sum of Two Hundred and Fifty Dollars ($250.00).

Judgment is further entered against the defendant and in favor of plaintiff, Mary M. Bourne, in the sum of Two Hundred and Fifty Dollars ($250.00).

It is further ordered that defendant shall pay the costs incurred in this action; however, by reason of the relative merits and complexities of the legal issues involved in the controversy, such costs shall not include counsel fees.

APPENDIX C

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 73-1469

TWENTIETH CENTURY MUSIC CORPORATION
and MARY M. BOURNE

vs.

GEORGE AIKEN,

Appellant

(D. C. Civil Action No. 72-440)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present:

VAN DUSEN, HUNTER and GARTH, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered March 26, 1973, be, and the same is hereby reversed and the cause is hereby remanded with direction to enter judgment for the defendant. Costs taxed against appellee.

Attest:

THOMAS QUINN
Clerk

June 21, 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NOV 18 19
MICHAEL RODAK, JR.

No. 74-452

TWENTIETH CENTURY MUSIC CORPORATION
and MARY M. BOURNE,

Petitioners,

v.

GEORGE AIKEN,

Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

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OCTOBER TERM, 1974

No. 74-452

TWENTIETH CENTURY MUSIC CORPORATION
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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1. Has not this Court "limited to its own facts" *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, so as to preclude a direct conflict between the decision in that case, which involved an *unauthorized* broadcast performance of copyrighted works, and the decision below in the

instant case, which involved an *authorized* broadcast performance?

2. Has not this Court, by its decisions in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394, clearly established a functional standard for determining what is a "performance" under the Copyright Act; and did not the Court of Appeals decide corectly to apply that standard, instead of extending the quantitative standard of *Jewell-LaSalle*, to the case at bar?

STATEMENT OF THE CASE

Respondent George Aiken owns and operates a fast-service food establishment in downtown Pittsburgh, Pennsylvania (Tr. 3, 4, 53).[1] The restaurant sells food for consumption on and off the premises and can accommodate approximately 40 patrons at counters and booths (Tr. 7, 55). Normal over-the-air radio broadcasts are heard by patrons and employees of the restaurant by virtue of the connection of a single radio tuner to five loud-speakers. Two of the speakers are located in the public portion of the restaurant, and the other speakers are found in the kitchen, washroom and office of the restaurant. (Tr. 54, 57, 58.) It is George Aiken's practice to switch on the radio at the beginning of each business day and thus have regular radio broadcasts audible in the restaurant during business hours (Tr. 54, 55). No effort is made to exclude any part of the broadcasts; accordingly, news, musical programs and commercials are all heard in the establishment (Tr. 55).

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[1] Record citations are to the official transcript ("Tr.") of trial proceedings.

On March 11, 1972, Respondent's radio was tuned to station WKJF-FM, Pittsburgh, at which time two musical compositions, "The More I See You" and "Me And My Shadow," were heard by at least six patrons in the restaurant (Tr. 4, 5, 6). WKJF-FM was authorized to perform those and other musical works under a standard FM broadcast license issued by the American Society of Composers, Authors and Publishers ("ASCAP") (Tr. 15).

ASCAP is an association which is authorized to license the right of public performance of copyrighted musical works, here specifically those of Petitioner Twentieth Century Music Corporation, copyright proprietor of "The More I See You," and Petitioner Mary M. Bourne, copyright proprietor of "Me and My Shadow" (Tr. 3, 12, 13).

ASCAP has licensed other commercial establishments which utilize a radio tuner and external speakers (Tr. 18, 19, 28). ASCAP presently has direct license agreements with 5,150 business firms. These agreements authorize the licensee to play tapes and records as well as to use radio and speakers for the presentation of copyrighted works. Under the agreements, ASCAP receives annual royalty payments of $246,000.. (Tr. 35; 356 F. Supp. at 273.) These annual fees constitute 0.35% of ASCAP's total annual revenues of $70 million (Tr. 42).

On June 2, 1972, Petitioners-plaintiffs filed a complaint in the U.S. District Court for the Western District of Pennsylvania, alleging that Respondent-defendant Aiken had, by tuning in and amplifying WKJF-FM's performance of Petitioners' musical compositions, publicly performed those works for profit, within the meaning of the Copyright Act, 17 U.S.C. § 1, *et seq.* Petitioners requested that Aiken be enjoined from making the alleged public performances and

that he pay such damages as the Court deemed proper, but not less than $250 in each cause of action.

On March 26, 1973, judgment was entered against George Aiken and in favor of Petitioners in the sum of $250 for each Petitioner (256 F. Supp. 271 (W.D. Pa. 1973)).

The trial court's decision was reversed by the U.S. Court of Appeals for the Third Circuit, which, applying the "functional" test adopted by this Court in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, and enlarged upon in *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394, concluded that Aiken's "extension of the range of audibility of a broadcast program" did not constitute a "performance" within the meaning of the Copyright Act (500 F.2d 127, 137 (1974)).

ARGUMENT

I. The decision below does not conflict directly with this Court's decision in *Jewell-LaSalle*.

Petitioners assert that the decision of the court below conflicts with the decision of this Court in *Buck v. Jewell-LaSalle Realty Co., supra*. That contention is without merit.

In *Fortnightly Corp. v. United Artists Television, Inc., supra*, this Court expressly ruled that "[t]he *Jewell-LaSalle* decision must be understood as limited to its own facts."[2]

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[2] 392 U.S. at 397 n. 18.

Moreover, before stating that generalization, the Court characterized the critical facts of *Jewell-LaSalle* in such a manner as to distinguish them precisely from the facts of the case at bar. The Court stated:

> "***But in *Jewell-LaSalle*, a hotel received on a master radio set an unauthorized broadcast of a copyrighted work and transmitted that broadcast to all the public and private rooms of the hotel by means of speakers installed by the hotel in each room. The Court held the hotel liable for infringement but noted that the result might have differed if, as in this case, the original broadcast had been authorized by the copyright holder. 283 U.S. at 199, n. 5. The *Jewell-LaSalle* decision must be understood as limited to its own facts.***"[3]

Thus, it was the Court's view at the time of *Fortnightly* that a critical fact in *Jewell-LaSalle* – at least for the purpose of limiting the old case – was the fact that the radio broadcast of a copyrighted work was not authorized by the copyright holder.[4] In the instant case, however, the broadcasts in question *were* authorized.[5]

---

[3] *Id.*

[4] Law review commentators also so read footnote 18 of the *Fortnightly* opinion. *See e.g.*, Comment, *The Copyright Law and its Relevance to CATV: Can An Old Dog Be Taught New Tricks*, 19 BUFF. L. REV. 65, 78 (1969); Comment, *CATV and Copyright Liability, The Final Decision*, 1 CONN. L. REV. 401, 404 (1968); *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 273 & n. 11 (1968); 25 HAST. L.J. 1507, 1513 (1974); 47 N.C.L. REV. 914, 920 (1969).

[5] Also, as the Court in *Fortnightly* observed, the broadcast at issue in *Jewell-LaSalle* was transmitted to all the public rooms and

(continued)

The factual differences of the instant case necessarily place it outside the decision of *Jewell-LaSalle*, when the latter is "understood as limited to its own facts."[6]

The Court of Appeals below, while correctly deciding that respondent Aiken's reception of copyrighted material on radio broadcasts was not a "performance" of that material within the meaning of the Copyright Act, incorrectly characterized this case as being on "all fours" with the *Jewell-LaSalle* case.[7] As has been demonstrated above, this is inaccurate, because the cases are easily distinguishable. Therefore, it matters not whether the *Jewell-LaSalle* case has been effectively overruled, as Justices Fortas and Blackmun suggested in dissenting opinions in *Fortnightly*[8] and *Teleprompter*[9] and as the Court of Appeals below also seemed to conclude.[10] What does matter for purposes of

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[5] (continued) private guest rooms of the hotel, which must have involved a complex system of hundreds of speakers. In the instant case, however, the five radio speakers in respondent Aiken's restaurant were confined to one room which was open to the public, plus areas open only to employees. This factual distinction can be better appreciated when examined in the light of ASCAP's own policy of not demanding license fees from establishments which use only one radio speaker (See Petition 16 n.).

[6] *See* Nashville C. & St. L. Ry. v. Browning, 310 U.S. 362, 370-71 ("Plainly, therefore, the case must have rested upon considerations peculiar to its own facts. Those are not the facts now before us.").

[7] 500 F.2d at 135.

[8] 392 U.S. at 404-08.

[9] 415 U.S. at 415-16.

[10] 500 F.2d at 136 n. 21.

disposing of the petition for writ of certiorari is that there is no definite and direct conflict between *Jewell-LaSalle* and the instant case. "That the conflict must be direct is emphasized by the fact that although old Rule 38(5)(b) required only a showing that the decision of the Court of Appeals is 'probably' in conflict with applicable Supreme Court decisions, the present Rule 19(1)(b) omits the word 'probably.' "[11]

Considering this Court's absolute rejection of the rationale of *Jewell-LaSalle* (see part II, *infra*) and its severe limitation of that "questionable 35-year-old decision"[12] to its own facts, the Court should conclude that the decision below in this case does not conflict with *Jewell-LaSalle*.

II. The court below correctly construed this Court's decisions in *Fortnightly* and *Teleprompter*.

Petitioners argue that this Court's opinions in *Fortnightly* and *Teleprompter* are applicable only to cable television. Such a ruling now would be most surprising, because the *ratio decidendi* of those cases is not so restrictive. Rather, the Court's analysis is in terms of broadcasting generally as well as television specifically.

The Court of Appeals notes[13] that in *Fortnightly*[14] this Court had quoted with approval the rationale of a radio broadcast case, *Buck v. Debaum:*

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[11] R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE, § 4.5, at 158 (4th ed. 1969). In revising its rules in 1970, the Court made no change in Rule 19.

[12] 392 U.S. at 401 n. 30.

[13] 500 F.2d at 137 n. 22.

[14] 392 U.S. at 398 n. 24.

> "One who manually or by human agency merely actuates electrical instrumentalities, whereby inaudible elements that are omnipresent in the air are made audible to persons who are within hearing, does not 'perform' within the meaning of the Copyright Law."[15]

In the *Fortnightly* opinion[16] the Court stated: "Broadcasters perform.[23] Viewers do not perform.[24]" Footnote 23 includes citations to radio broadcast cases in each of which a broadcaster, not the listener, was held liable for an unauthorized use of a copyrighted work. The footnote also states that "Congress in effect validated these decisions in 1952 when it added to §1(c) a special damages provision for 'infringement by broadcast.' 66 Stat. 752."

While Congress has specifically codified court rulings proscribing "infringement by broadcast," it has not added language to the Copyright Act which would recognize any prohibition of receptions of broadcast works. In *Fortnightly* the Court implicitly made this point in using the 1952 amendment to support its distinction between broadcasters and viewers for purposes of copyright liability. Petitioners, however, do not mention this selective codification by Congress and its implication against inclusion of broadcast receptions as an infringement of copyright.[17]

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15 40 F.2d 734, 735 (S.D. Cal. 1929).

16 392 U.S. at 398.

17 Instead, Petitioners claim support for their position from the *inaction* of Congress with respect to bills which would have specifically exempted radio receptions from the reach of the Act. However, Petitioners fail to find similar negative implication in the failure of Congressional bills, relied on in its own Petition, which would have specified copyright liability for such radio receptions. (Petition 15-16.)

Footnote 24 of *Fortnightly* is the *Debaum* language quoted above. *Debaum* involved a fact situation very similar to the one at bar, including the authorized use of a copyrighted song by the broadcaster and its reception and amplification by a cafe owner.[18]

Petitioners not only ignore this Court's approval of *Debaum* but appear to misunderstand the similar uses of broadcast matter to which cable television systems are put. Just as the restaurant owners in *Debaum* and this case amplified their radio receptions for the enjoyment of customers and employees, so do hotels, motels, bars, restaurants and other business establishments subscribe to cable television for these entertainment purposes.[19] Thus, petitioners are patently incorrect in stating with respect to cable television that "each subscriber owns his own television set and the cable systems merely enhance the capacity of those private sets to receive – in the privacy of the subscriber's own home – programs broadcast by television stations . . ." (Petition 12).

---

[18] The District Court stated in *Debaum:*

"The owner of a copyrighted musical composition can fully protect himself against any unauthorized invasion of his property right by refusing to license the broadcasting station to perform his musical composition; but, when he expressly licenses and consents to a radio broadcast of his copyrighted composition, he *must be held* to have acquiesced in the utilization of all forces of nature that are resultant from the licensed broadcast of his copyrighted musical composition." 40 F.2d at 736 (emphasis added).

[19] *See Fortnightly,* 392 U.S. at 393 n. 7; *United Artists Television, Inc. v. Fortnightly Corp.,* 377 F.2d 872, 875 (2d Cir. 1967); Record, Vol. 1 at 219a, Transcript of District Court Proceedings, Sup. Ct. Case No. 618, Fortnightly Corp. v. United Artists Television, Inc.

Petitioners also ignore the fact that, under the *Fortnightly* and *Teleprompter* decisions, cable systems may carry FM broadcasts of the very kind involved here without any potential copyright liability.[20] It would indeed be anomalous if small businesses could not receive and amplify these radio programs within their own establishments while cable systems may receive, amplify and distribute these radio programs to a large number of such establishments, without copyright licensing.

Respondent Aiken is much less of an "active" participant when he receives radio programs in his own establishment than is a cable system (with or without "distant signals") when the system provides both television and radio programs to many commercial and home subscribers. In both cases, when the copyrighted materials are authorized for the broadcasts in question, the act of reception and amplification of those broadcasts "falls on the viewer's side of the line."[21]

The significance of the fact that the broadcast-station "performances" are authorized by the copyright holders, in the case of both cable television and radio extension speakers, is further suggested in the Court's opinion in *Teleprompter*. There the Court explained that when a cable system extends the audience otherwise available to the broadcaster both the broadcaster and the copyright holder may charge higher fees, for commercial advertising and copyright licensing respectively.

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[20] This point was made in the testimony of the then General Counsel of ASCAP, Herman Finkelstein, in *Hearings on S. 1006* (Copyright Law Revision - CATV) *Before the Subcommittee on Patents, Trademarks and Copyrights of the Senate Judiciary Committee*, 89th Cong., 2d Sess. 140 (1966).

[21] *Fortnightly*, 392 U.S. at 399.

> "By extending the range of viewability of a broadcast program, CATV systems thus do not interfere in any traditional sense with the copyright holders' means of extracting recompense for their creativity or labor.*** From the point of view of the copyright holders, such market changes will mean that the compensation a broadcaster will be willing to pay for the use of copyrighted material will be calculated on the basis of the size of the direct broadcast market augmented by the size of the CATV market.
>
> "These shifts in current business and commercial relationships, while of significance with respect to the organization and growth of the communications industry, simply cannot be controlled by means of litigation based on copyright legislation enacted more than half a century ago, when neither broadcast television nor CATV was yet conceived. Detailed regulation of these relationships, and any ultimate resolution of the many sensitive and important problems in this field, must be left to Congress."[22]

This explains why copyright holders are not likely to be unfairly injured by the ruling that radio pickups like Respondent Aiken's do not constitute "performances" under the Copyright Act. The license fees charged broadcasters should reflect the sizes of their audiences, and those audiences include customers and employees in business establishments using radio speaker systems.

---

[22] 415 U.S. at 412-14 (footnotes omitted). *See* note 17, *supra*, and accompanying text.

Petitioners' own evidence fails to show that the decision below will have anything more than a minuscule economic impact upon copyright holders. ASCAP, the copyright pool, has annual gross revenues of more than $70 million. From the 5,150 direct copyright licenses of the kind involved in this case, ASCAP annually derives about $246,000, or a mere 0.35% of its total revenues. Moreover, these licenses include authorization for the businesses to use tape and disc recordings of copyrighted works. Even if all of these 5,150 businesses use radio and loudspeakers, there is no evidence that many do not also play recorded music under the same license agreement; and the necessity for continued licensing in order to make the latter use of copyrighted works is not affected by the decision below.

While, as petitioners note (Petition 13), the trial court found that a decision in this case adverse to ASCAP "might have an effect upon the fee level" for copyright licensing of background music services like Muzak, the magnitude of that effect is not a matter of record evidence. Even if it were assumed *arguendo* that the entire amount of such licensing fees, some $2,100,000 annually, were lost to ASCAP (a most unrealistic assumption), the total gross revenue loss to ASCAP (*i.e.*, $2,346,000) resulting from the decision below would be no more than 3.35% of its annual revenues. In view of the certainty that it would be much less than that figure (with ASCAP also having the opportunity to negotiate or litigate for higher broadcast licensing fees), there is no basis for Petitioners' claim that the decision below would disrupt important economic relationships.

Further, even if there were a showing of actual economic injury to copyright holders, "such a showing would be of very little relevance to the copyright question [*i.e.*, whether there has been a "performance"] we decide here.*** While

securing compensation to the holders of copyrights was an essential purpose of that Act, freezing existing economic arrangements for doing so was not." *Teleprompter*, 415 U.S. at 413-14 n. 15.

Certainly there is here no threatened disruption of existing relationships with the importance and repeated judicial support of the industry-wide relationships involved in *Flood v. Kuhn*, 407 U.S. 258, relied upon by Petitioners (Petition 14-16). Moreover, in the *Flood* case there was definitely a conflict of decisions to which the *stare decisis* doctrine was applied when the case was considered on its merits. In the instant case, there is no such direct conflict, as explained in part I above, and thus, in view of the *Fortnightly* and *Teleprompter* decisions, there is no need for the Court to review the decision below.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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November, 1974.

LIBRARY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-452

TWENTIETH CENTURY MUSIC CORPORATION and MARY M. BOURNE,

Petitioners,

—v.—

GEORGE AIKIN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

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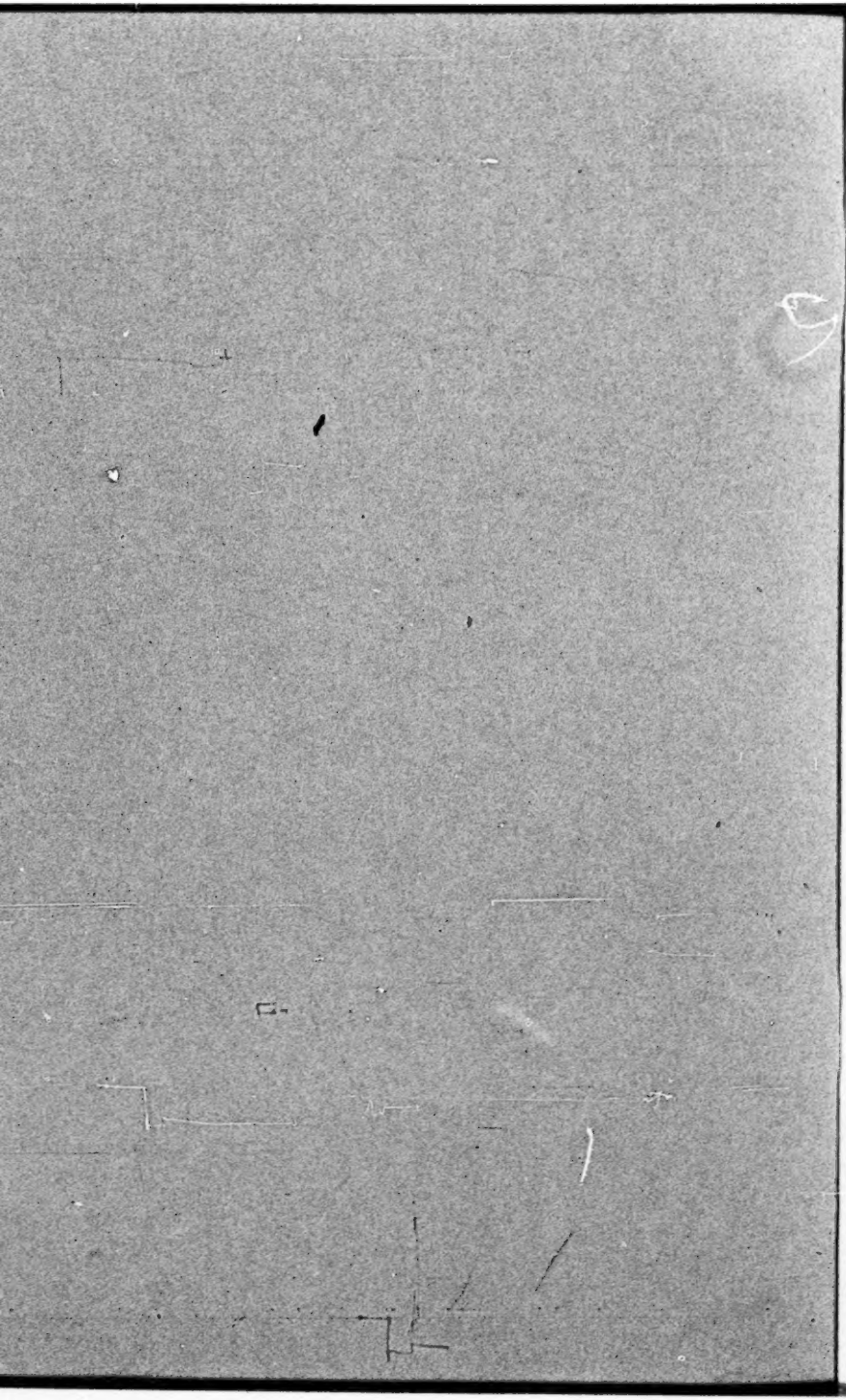

Supreme Court of the United States

October Term, 1974

No. 74-452

TWENTIETH CENTURY MUSIC CORPORATION and MARY M. BOURNE,

Petitioners,

—v.—

GEORGE AIKIN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Motion for Leave to File Brief As *Amicus Curiae*

The Authors League of America respectfully petitions for leave to file the annexed brief *amicus curiae.* The Authors League is a national society of professional writers and dramatists. One of its principal purposes is to express their views in cases involving authors' rights under the Copyright Act. The decision on appeal is of grave concern to Authors League members because (i) it deprives authors of a valuable right granted by the Copyright Act; and (ii) it will deny several League members compensation for commercial exploitations of the music they compose for the stage (and license for broadcasting through ASCAP and other performing rights societies.) Because the issue is of such importance to its members, The Authors League respectfully applies for leave to file its brief *amicus curiae.* Counsel for the petitioners have consented to the filing of the brief.

Respectfully submitted,

IRWIN KARP
Attorney for The Authors League of America, Inc., as amicus curiae

IN THE

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BRIEF OF THE AUTHORS LEAGUE OF AMERICA

Interest of The Authors League

The Authors League is a national society of professional writers and dramatists. Several of them compose music for musical comedies, revues and other works produced on the living stage, and license the broadcasting rights in their compositions through performing rights societies such as ASCAP. The decision below divests these authors of a right granted to them in Sec. 1(e) of the Copyright Act, as this Court recognized four decades ago. The decision also reflects a narrow interpretation of the Act, inconsistent with its Constitutional purpose.

Argument

The respondent's restaurants performed petitioners' copyrighted songs by presenting broadcast renditions of them over a radio set and connected loudspeakers. Respondent's use of these copyrighted compositions was identical with that which this Court unanimously held to be an infringement in *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931), for the reasons set forth in Mr. Justice Brandeis' lucid and logical opinion.

Fortnightly Corp. v. *United Artists*, 392 U.S. 390 (1968) did not reverse *Jewell-LaSalle*, and the rationale of *Fortnightly* does not justify reversal now.

In *Fortnightly*, the Court noted that "Members of the public, by means of television sets and antennas that they themselves provide, receive the broadcaster's signals and reconvert them into the visible images and audible sounds of the program." (392 U.S. at p. 397-8). It decided that Fortnightly did not "perform" because it only provided an antenna which "members of the public" could hookup to the "television sets . . . that they themselves provide"—and on which "they themselves . . . receive" the signals, and "themselves" select the programs they wish to view.

Here, and in *Jewell-LaSalle*, the employees and customers of respondent's restaurant (and LaSalle's hotel-public rooms) do not "themselves provide" the "(radio) sets" and do not "themselves" receive the broadcaster's signals and convert them into renditions of petitioner's copyrighted songs. Rather, as Mr. Justice Brandeis emphasized, what the customers in respondent's restaurants hear is "music produced by instrumentalities under its

control." And, as he noted, "There is no difference in substance between the case where a (restaurant) engages an orchestra to furnish the music and that where, by means of the radio set and loudspeakers here employed, it furnishes the same music for the same purpose." (at p. 201)

And it does not answer Mr. Justice Brandeis' analysis to argue that each customer "could" have listened to the same broadcast on his or her own portable radio. If each person had played his own set in respondent's restaurant, choosing his own program, the result would have been bedlam—not entertainment. More important, the same rendition of a work can be presented as a "public performance" to an audience, or can be obtained by individuals for private reception. For example: most radio stations perform copyrighted music by playing recordings of compositions. Members of their audiences can buy the same recordings and play them at home on their own phonographs. But the radio station's presentation of the recording is nonetheless a "public performance" which is protected by the composer's copyright and would be an infringement if made without his permission.

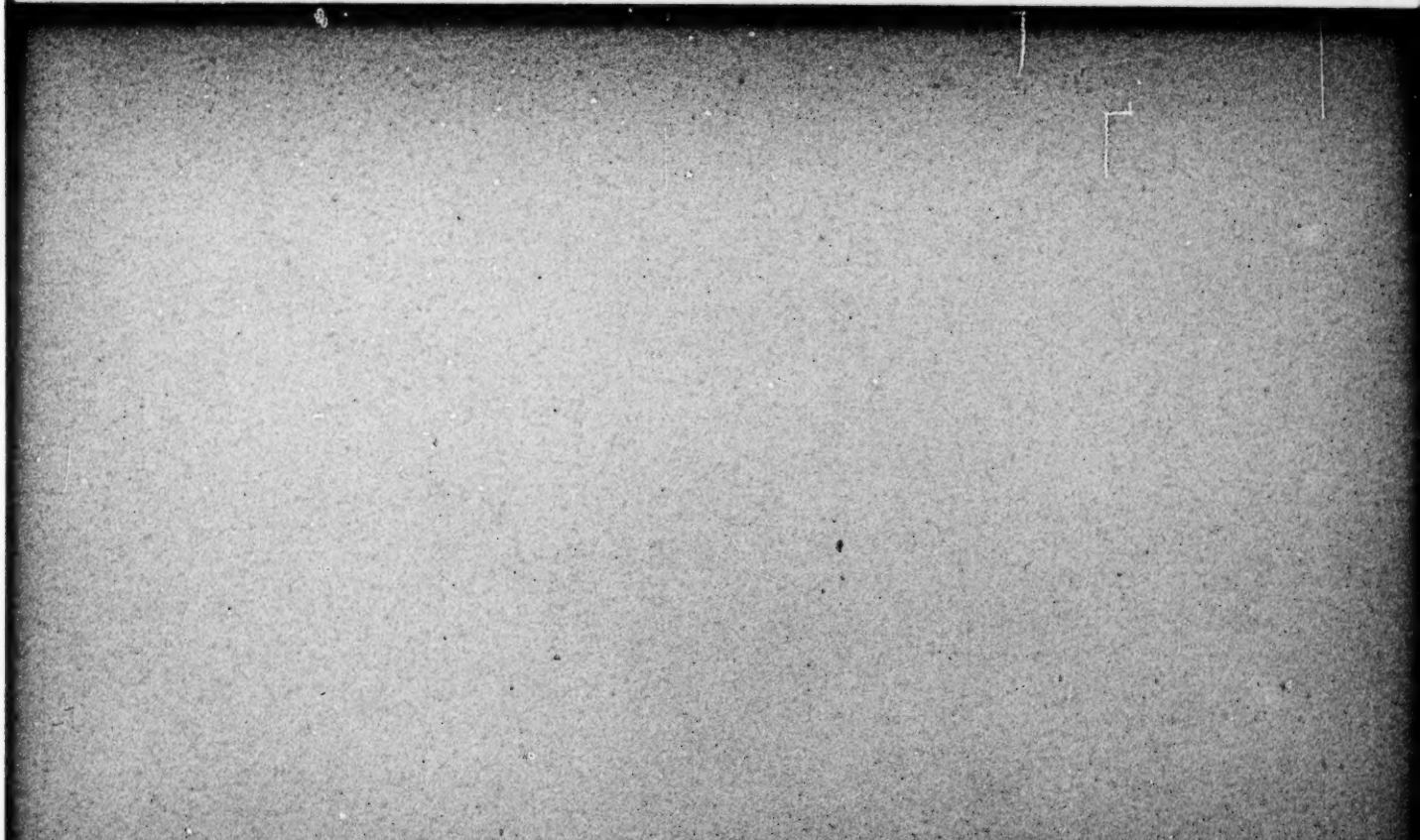
We submit that the respondent's use of petitioners' copyrighted songs meets the *Fortnightly* "functional" test of a performance. Moreover, it meets the equally significant criterion enunciated by Mr. Justice Holmes—the purpose for which the respondent presented petitioners' music to an audience. Here, as in *Herbert* v. *Shanley Co.*, "the purpose of employing it is profit and that is enough." 242 U.S. 591, 595.

CONCLUSION

It is respectfully submitted that the decision of the Court of Appeals should be reversed.

Respectfully submitted,

IRWIN KARP
Attorney for The Authors League of America, Inc., as amicus curiae.



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BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit, reported at 500 F.2d 127 (1974), is reprinted as Appendix A to the petition for a writ of certiorari. The opinion of the United States District Court for the Western District of Pennsylvania, reported at 356 F. Supp. 271 (1973), is reprinted as Appendix B to the petition.

Jurisdiction

The judgment of the Court of Appeals, Appendix C to the petition, was entered on June 21, 1974. A timely petition for a writ of certiorari was docketed on October 18, 1974. This Court granted the writ on December 16, 1974. Jurisdiction here is invoked under 28 U.S.C. §1254(1). Jurisdiction in the District Court was based on 28 U.S.C. §1338.

Questions Presented

Over 5,000 commercial establishments, including restaurants, hotels and other places catering to the public, pay nearly one-quarter of a million dollars annually to the composers, authors and music publishers whose copyrighted musical compositions are broadcast by radio stations, received in the establishments, and played over loudspeakers to entertain customers and employees. Another two million dollars is paid by background or wired music operators, like Muzak, who service an additional 75,000 commercial establishments pursuant to related contractual arrangements.

These establishments using radio receivers and loudspeakers have entered into license agreements to pay these substantial fees because in 1931, in an unanimous opinion by Mr. Justice Brandeis, this Court held that when a commercial establishment makes available to its customers musical compositions transmitted by a broadcaster through the instrumentality of a radio receiver and loudspeakers installed by the establishment and wholly under its control, it "performs" those compositions publicly for profit within

the meaning of Section 1 of the Copyright Act of 1909, now 17 U.S.C. §1(e). *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931). The court below declined to apply this Supreme Court decision on identical facts. It conceded that the present case is "on all fours" with *Jewell-LaSalle*. But it concluded that two recent decisions of this Court involving cable television (CATV) systems—*Fortnightly Corp.* v. *United Artists*, 392 U.S. 390 (1968), and *Teleprompter Corp.* v. *CBS*, 415 U.S. 394 (1974)—had, albeit without saying so, consigned *Jewell-LaSalle* to the dustbin of history.

In so ruling, the court below misconstrued the CATV decisions, undermined an important rule of law established four decades ago and adhered to throughout the world, and jeopardized the material well-being of America's composers, authors and music publishers who have over the past 40 years come to depend upon the business relationships evolved in legitimate and justified reliance upon *Jewell-LaSalle*.

The questions presented are as follows:

1. Should not this Court protect the integrity of its unanimous decision in *Jewell-LaSalle*, which, although "confined to its facts" in recent years by a majority of this Court, has not been overruled?

2. The ultimate question is whether there has been a "performance" within the meaning of the Act. Must the same answer arrived at for CATV systems, which assist a viewer to watch his own television set in the privacy of his own home, be needlessly applied to commercial estab-

lishments using loudspeakers to make broadcast music available to customers and employees in such public places as hotels and restaurants?

3. Under the "functional" test articulated in the CATV decision, it is concededly a "performance" for a restaurant to provide copyrighted music to its customers and employees through the instrumentality of records, tapes, background music or live orchestras. Does it make sense to reach a contrary conclusion when a restaurant's radio receiver and loudspeakers accomplish the same purpose?

4. Should not the CATV decisions be construed in the context of the new industry from which they arose, and not unnecessarily and heedlessly extended to the music world in a way that would disrupt important business relationships evolved in legitimate and justified reliance upon *Jewell-LaSalle*?

5. Since 1931 it has been a "performance" within the meaning of the Copyright Act for a commercial establishment to receive radio broadcasts of copyrighted musical compositions and make them available to customers and employees over loudspeakers under its control. Is it not still a "performance" for a commercial establishment to do the same thing today, especially where a vital and culturally significant industry has grown up in the past 40 years in legitimate reliance upon that authoritative ruling, and where the Congress has not only repeatedly declined to reject the ruling but has repeatedly incorporated it in proposed revisions to the Copyright Act?

6. This Court spared the new CATV industry copyright liability because it did not want to expose the industry

retroactively to a burden not previously borne. Should not the Court reach a different result with respect to music where the equities are to the contrary—where there are long-established practices that have developed in good faith reliance upon an authoritative ruling that commercial establishments *are* liable for copyright infringement when they receive copyrighted musical compositions broadcast by others and make them available to their customers and employees over loudspeakers?

Statute Involved

Section 1 of the Copyright Act, 17 U.S.C. §1, provides in pertinent part:

> "§1 Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:
>
> * * *
>
> (e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced. * * * And as a condition of extending the copyright control to such mechanical reproductions, that whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of

> 2 cents on each such part manufactured, to be paid by the manufacturer thereof. * * * The payment of the royalty provided for by this section shall free the articles or devices for which such royalty has been paid from further contribution to the copyright except in case of public performance for profit. * * *"

There are only two exceptions to the grant of the exclusive right of "public performance for profit". One is contained in the last paragraph of Section 1(e), and provides:

> "The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs."

The other exception is contained in Section 104 of Title 17, and exempts certain nonprofit, charitable, and educational performances. It provides:

> "* * * That nothing in this title shall be so construed as to prevent the performance of religious or secular works such as oratorios, cantatas, masses, or octavo choruses by public schools, church choirs, or vocal societies, rented, borrowed, or obtained from some public library, public school, church choir, school choir, or vocal society, provided the performance is given for charitable or educational purposes and not for profit."

Statement of the Case

A. The Factual Background

1. The Performance by Aiken

Respondent George Aiken owns and operates a chain of fast food restaurants in Pittsburgh, Pennsylvania. On March 11, 1972, the customers and employees in one of his restaurants were entertained by renditions of two popular musical compositions: "The More I See You", whose copyright proprietor is petitioner Twentieth Century Music Corporation, and "Me and My Shadow," whose copyright proprietor is petitioner Mary M. Bourne. (App. 8A, 9A; C.P. App. B2)*

These two songs were broadcast that day by Pittsburgh radio station WKJF-FM, a licensee of the American Society of Composers, Authors and Publishers ("ASCAP"), of which organization petitioners are members. The broadcast was received upon a radio receiver in Aiken's establishment and transmitted over five loudspeakers. Three were in the public portion of the restaurant; the others, in places accessible only to employees. It was Aiken's practice to turn his receiver on each morning and thus to entertain his customers and employees throughout the day. Aiken had no license publicly to perform copyrighted music. (App. 61A; C.P. App. B2-3)

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* The (App. 8A, 9A) reference is to the printed Appendix; the (C.P. App. B2) reference is to the appendices to the petition for a writ of certiorari, where the opinions below are printed.

2. *ASCAP's Licensing System*

ASCAP was organized in 1914 as a non-profit, unincorporated membership association—essentially a cooperative of authors, composers and music publishers. Its purpose was to prevent piracy and to license performance rights of its members' musical compositions. A 1941 consent decree, as amended in 1950 in *United States* v. *ASCAP*, 1950 Trade Cases, ¶62,595, at p. 63,750 (S.D.N.Y. 1950), requires that ASCAP's fees be reasonable, non-discriminatory and uniform, and provides a simple judicial remedy for any party who questions the reasonableness of the rates. For a fuller description of ASCAP, its role as a non-exclusive licensing agency for its members, and the impact of the decree, see *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), cert. denied, 389 U.S. 1045 (1968).

ASCAP has negotiated licenses for performances of its members' musical compositions by hotels and restaurants employing radio receivers and loudspeakers to entertain customers and employees since shortly after this Court held in 1931 that such licenses were required. Presently some 5,150 restaurants, hotels and similar establishments are parties to such licenses.* ASCAP does not require licenses from so-called "Mop and Pop" stores—small establishments that use a home-type radio receiver without

* The trial court found as a fact that the rule in *Jewell-LaSalle* had been consistently applied to restaurants as well as hotels, and that both kinds of establishments had routinely entered into licenses with ASCAP, although there are contrary intimations in *Nimmer on Copyright* §107.41, at p. 410 n. 204 (1968), which was cited in *Fortnightly*, 392 U.S. at 405 n. 3. (C.P. App. B6 n. 4.) In the 1974 replacement pages for p. 410 of his treatise, Mr. Nimmer concedes that his original footnote was "misleading."

additional loudspeakers. (App. 29A-30A; C.P. App. B3) The license, which in the case of Aiken's establishment would cost only $5.00 a month, authorizes the performance of the entire repertory of copyrighted music written or published by ASCAP members. The same license also authorizes the use of tapes and recorded music without additional payment. (App. 43A)

ASCAP's licenses with broadcasters, including WKJF-FM in Pittsburgh, expressly negate the right of the broadcaster itself to license receivers of broadcasts to perform publicly for profit. That reservation provides:

> "Nothing herein contained shall be construed as authorizing LICENSEE to grant to others any right to reproduce or perform publicly for profit by any means, method or process whatsoever, any of the musical compositions licensed hereunder or as authorizing any receiver of any radio broadcast to perform publicly or reproduce the same for profit, by any means, method or process whatsoever." (App. 28A; C.P. App. B3 n.1).

This provision has been included in ASCAP licenses with broadcasters since 1932. See Warner, *Radio and Television Rights*, §133e (1953); Varmer, "Limitations on Performing Rights," 89 (1958) in 2 *Studies on Copyright* 835, 845 (Fischer Mem. Ed. 1963). Cf. *Society of European S.A.A.C.* v. *New York Hotel Statler Co.*, 19 F.Supp. 1 (S.D.N.Y. 1937), where the broadcaster's license contained such a provision. As a result of this provision, the broadcaster's license applies only at the point of broadcast; the license fees negotiated with broadcasters since 1932 reflect the fact that ASCAP reserves the right separately to

license public performances for profit by commercial establishments receiving broadcast music.*

In addition to the 5150 commercial establishments licensed by ASCAP publicly to perform radio music copyrighted by its members, another 75,000 hotels, restaurants and other commercial establishments use background music whose purveyors, such as Muzak, are licensed by ASCAP to provide such music by wire or multiplex FM (a point-to-point service not available to the public). Unlike the broadcaster licenses, these licenses do include the right to reproduce music at the places where loudspeakers are installed. Muzak and its franchises contended below that they compete with FM radio, and that their licensees will not pay as much for background music as they now do if they can obtain radio music free of license obligation. The trial court found that a decision in favor of Aiken "might have an effect on a pending request for reduction of licensing fees which has been filed by Muzak affiliates." (C.P. App. B4).

These long established business relationships yield $2,346,000 annually in fees to ASCAP for its member composers, authors and music publishers—$246,000 from licensed commercial establishments using radio and loudspeakers, and $2,100,000 from Muzak-type licenses. (App. 30A)

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* Herman Finkelstein's testimony at trial regarding 1941 negotiations relating to this provision reflected his own personal experience in the matter, which began in that year. (App. 29A) As the Warner and Varmer studies and the 1937 *Statler* decision show, the contractual provision in question has in fact been in use since shortly after the decision in *Jewell-LaSalle*.

B. In the District Court

Petitioners brought suit in the United States District Court for the Western District of Pennsylvania on June 2, 1972 to restrain Aiken's infringement of their copyrights and for the statutory damages of $250 per composition.

After a full trial, Judge Weis, who only a few days earlier had been appointed to the Court of Appeals, granted the monetary relief sought. He held that Aiken had done precisely that which this Court held in *Jewell-LaSalle* was a public "performance" for profit requiring a license. He concluded that failure to follow this Court's 1931 decision would jeopardize established business relationships developed in legitimate reliance upon that decision. He found that were he not to follow *Jewell-LaSalle,* commercial establishments would discontinue paying license fees for the use of broadcast music, and the fees that Muzak and similar services now pay for their rights might be adversely affected. (C.P. App. B4)

Judge Weis expressly rejected Aiken's argument that a contrary result was required by this Court's decision in *Fortnightly Corp.* v. *United Artists,* 392 U.S. 390 (1968). He noted that, although this Court had discussed *Jewell-LaSalle* in *Forthnightly,* it had expressly declined to overrule it. And he observed that, whereas the present petitioners sought only to protect established business relationships, the *Fortnightly* plaintiffs had sought to impose a new kind of liability retroactively upon an infant industry. (C.P. App. B6)

C. In the Court of Appeals

The Court of Appeals reversed, although it conceded that *Jewell-LaSalle* appeared to require affirmance of the trial court's decision. Indeed, the Court of Appeals admitted that Judge Weis "was faced with an 'all fours' decision' in *Jewell-LaSalle.*" And it did not dispute petitioners' position that failure to honor the rules of *Jewell-LaSalle* would deprive ASCAP's member composers, authors and publishers of nearly $250,000 in license fees annually, quite apart from the more than $2,000,000 received from the background music operators, who contend their fees should be reduced if commercial establishments are freed of license obligations in connection with radio music. But it insisted that *Fortnightly,* as amplified in *Teleprompter Corp.* v. *CBS,* 415 U.S. 394 (1974), had changed the meaning of the word "performance" for purposes of the Copyright Act—even in factual circumstances concededly identical to those in *Jewell-LaSalle.* After *Fortnightly* and *Teleprompter,* said the court, what Aiken did in his restaurant was no longer a "performance," even if it had been one for 40 years.

Summary of Argument

This Court does not lightly overrule prior decisions which interpret complex statutory schemes and thereafter receive legislative assent. There are powerful reasons not to do so here.

First, there is no basis for distinguishing the present case from *Jewell-LaSalle;* as the court below recognized, the cases are on "all fours." Second, *Jewell-LaSalle* has

not been overruled by this Court; in the CATV cases, *Jewell-LaSalle* was left to govern in its own sphere. Third, application of the "functional" test used by the majority in the CATV cases does not require the overruling of *Jewell-LaSalle;* the conduct of respondent Aiken is the exact functional equivalent of the use in public places of live orchestras, records and background music to entertain customers and employees—and no one disputes that these are "performances" for copyright purposes. Were there any doubt, it should be laid to rest by the fact that *Jewell-LaSalle's* approach is followed in Britain, Canada, Australia, France, Germany and elsewhere, and has been incorporated into every copyright revision bill introduced in Congress since 1957. Finally, intricate business relationships of immense importance to the economic health of music in America have developed in legitimate and justified reliance upon this Court's decision in 1931, and are entitled to vindication.

ARGUMENT

I.

Jewell-LaSalle controls the present case.

Jewell-LaSalle came to this Court on a certified question:*

> "Do the acts of a hotel proprietor, in making available to his guests, through the instrumentality of a radio receiving set and loudspeakers installed in his hotel and under his control and for the entertainment

* A companion case, *Jewell-LaSalle Co.* v. *Buck,* 283 U.S. 202 (1931) raised three other certified questions, relating only to certain damage issues.

> of his guests, the hearing of a copyrighted musical composition which has been broadcast from the radio transmitting station, constitute a performance of such composition within the meaning of 17 U.S.C. Sec. 1(e)?" 283 U.S. at 196

An unanimous Court, speaking through Mr. Justice Brandeis, ruled that such acts were a performance under the Copyright Act of 1909. The Court held that in making radio music available to its guests the commercial establishment in question had "reproduced," rather than merely "audited," the original broadcast. It held:

> "There is no difference in substance between the case where a hotel engages an orchestra to furnish the music and that where, by means of the radio set and loud-speakers here employed, it furnishes the same music for the same purpose. In each the music is produced by instrumentalities under its control." 283 U.S. at 201.

All four of the judges who have previously considered this case have rejected respondent's argument that it can be distinguished from *Jewell-LaSalle* on the tenuous ground that the original broadcaster here is an ASCAP licensee, whereas the original broadcaster in the 1931 decision was unlicensed. They are correct; the cases cannot be so distinguished, and *Jewell-LaSalle* governs the case before the Court.

Mr. Justice Brandeis pointedly observed that the only question before the Court in *Jewell-LaSalle* was whether "reception for commercial purposes" was a "performance" within the meaning of the Act. All other questions were rigorously avoided, including the contention that even

if there were a "performance," it was not a public performance for profit. 283 U.S. at 202.

Mr. Justice Brandeis referred to the original broadcaster being unlicensed* only in contexts *unrelated* to the question whether there was a "performance". For example, he observed that the lack of a relationship between the unlicensed original broadcaster and the hotel proprietor eliminated the possibility of predicating liability against the latter on a theory of contributory infringement. 283 U.S. at 197 n. 4. And he stated there was no occasion to determine "the effect upon others of [the broadcaster's] paying a license fee"—not because the original broadcaster was in fact unlicensed, but because "radio reception for profit *in itself* constitutes infringement." 283 U.S. at 198 (emphasis added).

In a footnote the Justice suggested that had the original broadcaster been licensed, the hotel proprietor might have been able to argue that he was the beneficiary of an "implied license" to engage in "commercial reception and distribution." 283 U.S. at 199 n. 5. But the defense suggested in the footnote ceased to be available within a year of the decision, when the present form of broadcast license was developed. Since 1932 ASCAP's licenses with broadcasters have expressly negated any right on the part of a broadcaster impliedly or otherwise to license performances by those who commercially receive and distribute broadcast music. Since 1932 the license fees paid by broadcasters have taken into account the fact that they pay only for the right to broadcast and do not pay for the performance

* The fact was not adverted to in the question certified to the Court.

rights of others. In short, the implied license defense hinted at in the aforementioned footnote ceased to exist in 1932 and cannot now serve to distinguish *Jewell-LaSalle*.

Even more damaging to respondent's argument, the very premise of the "implied license" defense is that the commercial establishment receiving a licensed broadcast and amplifying it over loudspeakers *does* thereby "perform" within the meaning of the Act. Otherwise, it would not require a license.

The thrust of *Jewell-LaSalle* is unavoidable. Just as one who hires an orchestra to entertain customers and employees must honor the rights of the copyright proprietors, so too must he who "tunes in on a broadcasting station, for his own commercial purposes." 283 U.S. at 198: For "commercial reception," said the Court with an undivided voice, is a statutory "performance." The Court did suggest that, as a matter of policy, some other arrangement, perhaps relying exclusively upon broadcast licensing, might be desirable. But it noted that "the existing statute makes no exception." 283 U.S. at 199. The statute has not been changed.

II.

Jewell-LaSalle has not been overruled.

Jewell-LaSalle has never been overruled by this Court. Prior to 1968, its soundness was never questioned. In 1968, in *Fortnightly Corp.* v. *United Artists,* the Court was asked to extend the rule of *Jewell-LaSalle* to the novel technological circumstances presented by the CATV industry. The question was whether it was a "performance" under

the Act when a CATV system intercepted a local television signal and functioned as an antenna, enhancing its subscribers' pre-existing ability to receive the signal on their own television receivers in the privacy of their own homes. The CATV industry was new. It had never recognized any obligation to pay license fees to the proprietors of intercepted materials. Not one cent had ever been paid for such use by any CATV system to any copyright proprietor. The question, as this Court expressly recognized, was whether such liability should newly be created and retroactively applied. A majority declined to do so, holding that *Jewell-LaSalle* "must be understood as limited to its own facts." 392 U.S. at 397 n. 18. For purposes of determining CATV liability, it concluded that the question was whether CATV was "functionally" more like a "passive viewer" than an "active" broadcaster. The issue was resolved in favor of the economic status quo, freezing the present situation in which CATV was totally outside the copyright system. From that decision, Mr. Justice Fortas dissented. Three other members of the Court, Justices Douglas, Marshall and Harlan, did not participate.

In 1974 the Court was asked to decide whether *Fortnightly* reached other facets of CATV operations. *Teleprompter Corp.* v. *CBS* involved interception of distant signals by CATV systems that also originated their own programs and sold advertising on these programs. A majority once again resolved the question in favor of the status quo in the CATV industry, which continued to pay no license fees to copyright proprietors of retransmitted material. Once again, the Court chose not to disrupt existing economic patterns by retroactive imposition of a crushing liability, leaving to Congress the question whether to

create liability where for so long there had been none. From this decision, the Chief Justice and Justices Douglas and Blackmun dissented. But no member of the Court suggested that the decision in favor of the status quo in the CATV industry required the overruling of *Jewell-LaSalle* in its own field. Indeed, the majority did not even cite *Jewell-LaSalle*. No Justice wrote that composers, lyricists and music publishers should now go unpaid when hotels and restaurants—long accustomed to pay for the privilege—exploit copyrighted compositions for profit-making purposes.

III.

The "functional" approach of the CATV cases does not require the overruling of *Jewell-LaSalle*.

Even if one were not to take this Court at its word, and assume that when the Court said *Jewell-LaSalle* was to be confined to its facts it meant something else, the decision below is incorrect. For the "functional" approach applied in the CATV cases does not absolve respondent Aiken of his statutory obligation to compensate petitioners when he exploits their music for commercial purposes.

A. Respondent Aiken's Conduct Is Functionally Equivalent to Conduct Universally Regarded as a "Performance" Within the Meaning of the Copyright Laws.

The ultimate question is whether respondent Aiken "performed" petitioners' music when he received the copyrighted compositions broadcast by WKJF-FM and made them available over loudspeakers to customers and em-

ployees. For nearly a century in attempting to determine what constitutes a "performance" for copyright purposes, courts have drawn upon the model of the private citizen singing a song for his own amusement in the privacy of his own home. See e.g., Brett, M. R., in *Wall* v. *Taylor*, 11 Q.B.D. 106-07 (1882):

> 'Singing for one's own gratification without intending thereby to represent anything, or to amuse anyone else, would not, I think, be either a representation or performance, according to the ordinary meaning of these terms, nor would the fact of some other person being in the room at the time of such singing make it so; . . ."

The great British copyright authority, Thomas Scrutton, concurred, adding:

> "It is submitted that this must be taken with a further limitation that the performance, to be an infringement of the right of another must be such as to affect the commercial value of that right either by giving profit to the performer or depriving the proprietor of copyright of profit," citing *Duck* v. *Bates*, 3 Q.B.D. 843 (1884). Scrutton on Copyright (4th Ed. 1903), pp. 102-103.

No one denies that should respondent Aiken sing to himself "The More I See You" or "Me and My Shadow" while taking a shower, he would incur no liability for copyright infringement.

Foreign courts have uniformly contrasted this archetype of 'non-performance" with the reproduction of radio music in a hotel, restaurant, public house or factory. In Britain, for example, a long line of cases has established the rule that reception of radio music, even from a licensed

broadcaster, for use in a hotel, pub, or factory workroom is—unlike singing in a shower—a public performance. The leading case is *Performing Right Society, Ltd.* v. *Hammond's Bradford Brewery Company,* 150 L.T. Rep. 119, at 122 (Ct. of App. 1934), where Lawrence, L.J., said:

> "I find it impossible to escape from the conclusion that the owner of a receiving set who puts it into operation causes an acoustic representation of a musical work which is being broadcast to be given at the place where the receiving set is installed and is, therefore, himself performing or authorizing the performance of the musical work . . . ."

See also *Performing Right Society, Ltd.* v. *Camelo,* 3 All E.R. 557 (Ch. Div. 1936) (radio music from private room audible in pub); *Ernest Turner Electrical Instruments, Ltd.* v. *Performing Right Society,* 168 L.T. Rep. 285 (Ct. of App. 1943) (radio and phonographic music used in factory). These decisions were accepted by the draftsmen of the British Copyright Act of 1956, 4 & 5 Eliz. 2, ch. 74, §48(6), who declared the "occupier of premises" where a radio plays copyrighted work to be a performer thereof. See Carter-Ruck & E. P. Skone James, Copyright 221 (1965); Copinger & E. P. Skone James on Copyright §§527, 528, at pp. 224-25 (1971). The Canadian cases are in accord. See, for example, *Canadian Performing Right Society* v. *Ford Hotel, Ltd.,* 2 D.L.R. 391 (1935).

In *Society of European S.A.A.C.* v. *New York Hotel Statler Co.,* 19 F. Supp. at 6, Judge Woolsey described the *Hammond's Brewery* and *Ford Hotel* cases as follows:

> "The original broadcasters in both cases had licenses for 'broadcasting for domestic and private use only,' and in both cases it was held, under copyright statutes

substantially like ours, that the defendants, who were owners of hotels, were guilty of infringement of the plaintiffs' copyrights in receiving broadcasts of copyrighted musical compositions and reproducing them for their guests."

In the CATV cases this Court assumed that a private citizen watching television in his own home does not thereby "perform" for purposes of the Copyright Act.* The Court proceeded, however, to inquire whether a CATV system that enhances the private citizen's ability to receive an adequate signal, or even to make reception possible, is to be treated as closer to the model of the private citizen in his home than to that of the broadcaster. One may question the conclusion drawn by the Court. Indeed, four Justices dissented. But that conclusion is not dispositive of an inquiry directed to the commercial establishment that receives radio music and makes it available through loudspeakers for the amusement of customers and employees. It is difficult to identify such an establishment either with the citizen enjoying radio or television in the privacy of his home, or with the CATV system that facilitates such a purely private audition or viewing.

Here, there are much more compelling analogies—with the hotel keeper or restaurant owner who, to entertain customers and employees, hires an orchestra or singer to provide live music, or plays phonograph records, or arranges for a background music service. As to these analogies, the answer has never been in doubt. These *are* "performances" for copyright purposes. See, for example, Mr.

* In *Jewell-LaSalle*, Mr. Justice Brandeis had cautiously declined to pass on the question whether the mere turning on of a radio set in one's own home constitutes a performance, for "even if this be deemed a performance, it is neither public nor for profit." 283 U.S. at 196.

Justice Holmes' landmark opinion for this Court in *Herbert* v. *Shanley Co.*, 242 U.S. 591 (1917) (use of live singers or an orchestra in a restaurant or hotel is a public performance for profit); *Chappell & Co.* v. *Middletown Farmers Market & Auction Co.*, 334 F.2d 303 (3rd Cir. 1964) (playing of records in a public place is a performance); and *Leo Feist, Inc.* v. *Lew Tendler Tavern, Inc.*, 267 F.2d 494 (3rd Cir. 1959) (use of background music service is a performance by the restaurant owner as well as by the purveyor of the service).

If one were to disregard the explicit language of *Fortnightly Corp.*, assume that *Jewell-LaSalle* no longer governs even in its own sphere, and newly apply to these facts the same "functional" test used by the *Fortnightly* majority, who can reasonably deny that respondent Aiken's commercial use of a radio receiver and multiple loudspeakers is the exact "functional" equivalent of his using a background music service, or phonograph records, or a live orchestra for the identical purpose? Aiken's conduct is certainly closer to these classic types of "performance" than to the hypothetical man singing in his own shower. Accordingly, like them, it is a "performance" under the Act.

Any decision that respondent Aiken's conduct is not "functionally" a performance would be inconsistent with the well-established rulings that the use of live orchestras or records or background music in a hotel, restaurant or other public place is a performance within the meaning of the Act. The only viable alternative to regarding this case as settled by *Jewell-LaSalle* is to treat respondent Aiken for what he is—the "functional" equivalent of the user of live orchestras, or records, or background music services, and to require that he pay a modest fee to the composers, authors and music publishers whose art and craft he wishes to expropriate for his own commercial purposes.

B. *Jewell-LaSalle* Is Supported by the Rules in Other Jurisdictions and by Current Legislative Thinking.

***1. Other Countries Follow* Jewell-LaSalle.**

Jewell-LaSalle is not anomalous. As the cases cited at p. 20 *supra* demonstrate, the 1931 decision of this Court finds support in similar decisions in other jurisdictions. British and Canadian judges, for example, have consistently concluded that use of a radio and loudspeakers to reproduce broadcast music in a public place *is* a performance. If *Jewell-LaSalle* is an anomaly, it has been a contagious one.

Nor is support for *Jewell-LaSalle* confined to the aforementioned decisions. It is a general rule abroad that a restaurant, hotel or like establishment that uses a radio receiver and loudspeakers to make broadcast music available to customers and employees thereby "performs" copyrighted compositions so received and must obtain consent from the proprietors of the copyright.

The tariffs contained in the Appendix to this brief reflect world practice. In Britain, for example, the Performing Right Society, Ltd. publishes and enforces tariffs which provide, among other things, that restaurants, hotels and other public places using radios or other mechanical means to provide music for customers, guests and employees, must pay graduated annual fees. Standard Tariff "H", for example, imposes an annual fee of £4 upon a restaurant with not more than 15 seats that uses radio to perform copyrighted musical compositions, and an additional £1.50 for each additional ten seats or part thereof up to 75 (App. A1-2 hereto). Standard Tariff "RH" imposes comparable fees for use by residential hotels to perform copyrighted music (App. B1 hereto). Effective January 6,

1975, the rate for restaurants has been increased to £7 for the first 15 seats and £2.60 for each additional 10 seats up to 75 (App. C4 hereto). In Australia, the tariff of the Australasian Performing Right Association, Ltd., APRA, is $10 per year for restaurants, plus an additional 25 cents for each additional speaker (App. D2 hereto).* The comparable tariff of the French Performing Right Society, SACEM, is at App. E1-3 hereto; the translation of the West German Performing Right Society, GEMA, is at App. F1-4 hereto.

In Canada, despite judicial determination that use of the radio or phonograph in a public place is a "performance," there is no tariff for such use. The Canadian legislature, as a matter of legislative policy, has determined to transfer the obligation to pay for such performances from the restaurant owner to the broadcasters and record manufacturers. Section 50(7) of the Canadian Copyright Act, 1970 Revised Statutes, Ch. C-30, reads as follows:

> "In respect of public performances by means of any radio receiving set or gramophone in any place other than a theatre that is ordinarily and regularly used for entertainments to which an admission charge is made, no fees, charges or royalties shall be collectable

* APRA's definition of "performance" is instructive:

> "In general, performances of music "in public" are those given outside the precincts of the home. The means of performance are immaterial and it does not matter whether recordings, tapes, radios or television sets are employed or whether the music is played "live" by musicians. Similarly, it does not matter why the performance is given, where it is given or whether any charge is made. What does however matter is the playing of music in other than domestic circumstances. Those responsible must obtain permission: this means the proprietors, their managers or agents, or the occupiers of the premises concerned, or even the organisers themselves for locations not already covered under prior arrangements with APRA." (App. D1 hereto)

> from the owner or user of the radio receiving set or gramophone, but the Copyright Appeal Board shall, so far as possible, provide for the collection in advance from radio broadcasting stations or gramophone manufacturers, as the case may be, of fees, charges and royalties appropriate to the new conditions produced by the provisions of this subsection and shall fix the amount of the same; in so doing the Board shall take into account all expenses of collection and other outlays, if any, saved or savable by, for or on behalf of the owner of the copyright or performing right concerned or his agents, in consequence of the provisions of this subsection."

Thus, in Canada,* as to the use of radios or phonographs in public places, the legislature, while recognizing that such uses do involve "performances," has adopted something like the alternative mode of enforcing the copyright proprietor's rights mentioned by Mr. Justice Brandeis in his *Jewell-LaSalle* opinion. 283 U.S. at 199.

The foregoing materials are not exhaustive, but they should suffice to establish that the rule in *Jewell-LaSalle* is not anomalous, that it is in accord with the conclusion reached in other jurisdictions with like approaches to copyright.

There are special reasons to maintain the harmony between the rule in this country and the rule abroad. Under arrangements between ASCAP and its foreign counterparts, American authors, composers and music publishers receive fees when their works are performed in restaurants, hotels and other public places in Britain, Australia, France, Germany and elsewhere. In Canada, the fees they

* And in New Zealand, where the statutory scheme is similar. New Zealand Copyright Act of 1962, §§38(5), 60.

receive from Canadian broadcasters take into account the statutory exception and the administrative costs allegedly saved by that exception. Similarly, foreign authors, composers and musical publishers receive fees from performances in American restaurants, hotels and other public places of their copyrighted works. To overturn *Jewell-LaSalle* at this late date would disturb this well-established relationship.

2. *The Legislatures Have Accepted the Rule.*

Legislatures both here and abroad have adopted *Jewell-LaSalle's* approach to what constitutes a "performance." As previously noted, even the Canadian and New Zealand Copyright Acts expressly recognize that conduct like respondent Aiken's is conceptually a "performance" of material broadcast by a radio station, then proceed to create a special arrangement for enforcing the rights involved.

More important, both Houses of the United States Congress have fully endorsed the principle of *Jewell-LaSalle.* The legislative history is discussed at greater length later in this brief. It should suffice for present purposes to note that every copyright revision bill introduced in either House since 1957 has incorporated *Jewell-LaSalle,* and that each such bill to pass through either House followed the 1931 rule. See, for example, H.R. 2512, 90th Cong., 1st Sess., approved by the House of Representatives in 1967, and S. 1361, 93rd Cong., 2d Sess., approved in the Senate by a 70 to 1 vote in September of 1974. The relevant portions of S. 1361 (S. 22 in the present Congress) are set forth as Appendix G1-9 hereto.

IV.

Jewell-LaSalle should be adhered to in order to vindicate the business relationships developed in legitimate and justified reliance thereon over the past forty years.

The trial judge found, and the record establishes without contradiction, that significant economic interests have developed in reliance upon *Jewell-LaSalle*. When the decision was announced over forty years ago, ASCAP on behalf of its members immediately began to negotiate licenses under which commercial establishments like hotels and restaurants agreed to pay modest monthly fees for the use of copyrighted music to entertain customers and employees. The agreements negotiated with broadcasters since 1932, providing for fees for performance only at the point of broadcast, were carefully geared to fit *but not overlap* the hotel and restaurant licenses. Background music operators like Muzak contend that *Jewell-LaSalle's* continued viability has a bearing upon the license arrangements that they have negotiated with ASCAP.

The District Court found, and the Court of Appeals did not disagree, that if *Jewell-LaSalle* were abandoned, this intricate network of licenses so important to the welfare of the nation's composers, authors and music publishers, would be jeopardized. Even respondent has not disputed that damage would be done should he prevail. He counters with the lame proposition that the dollars involved are relatively few—"only" a few million. The dollars are relatively few, for that segment of the world of music occupied by composers, authors and music pub-

lishers *is* slight and fragile. But however unimpressive in purely monetary terms when compared with the fast food business or the broadcasting industry, it surely is not casually to be sacrificed. In *Flood* v. *Kuhn*, 407 U.S. 258 (1972), this Court did not, after all, adhere to *Federal Baseball Club* v. *National League*, 259 U.S. 200 (1922), and vindicate the reliance interest there asserted, on the basis of the number of dollars involved.* Instead, the Court responded to the "unique" role of baseball as an institution, and to pleas for fairness and continuity. See 407 U.S. at 282. With all due respect, the claims of the music makers that they have justly relied upon *Jewell-LaSalle* for forty years are at least as persuasive as those of the baseball owners that they relied upon earlier decisions regarding the inapplicability of the antitrust laws to baseball.

In *Flood* v. *Kuhn*, this Court acknowledged that when economic interests develop in fair and reasonable reliance upon past decisions, the Court will honorably vindicate that reliance interest while remaining free to apply other interpretations of the same statutory language to other industries. Thus, although the Court preserved what it conceded to be the "aberration" of baseball's immunity from antitrust regulation, it denied similar immunity to football in *Radovich* v. *National Football League*, 352 U.S. 445 (1957); to boxing in *United States* v. *International Boxing Club*, 348 U.S. 236 (1955); and to the theatre in *United States* v. *Schubert*, 348 U.S. 222 (1955). In music, as in baseball, the "slate is not clean", and it has not been so for nearly half a century. *Cf. Flood* v. *Kuhn*, 407 U.S. at 283.

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* The monetary consequences of overruling *Federal Baseball* were sharply disputed by the parties, and they went unmentioned in the *Flood* v. *Kuhn* opinions.

V.

Congressional action and inaction since 1931 supports adherence to *Jewell-LaSalle*.

In considering whether to adhere to subsequently challenged judicial rulings, this Court has regularly examined relevant legislative action or inaction. In *Flood* v. *Kuhn*, for example, the Court made such an inquiry and concluded that there was more than "mere Congressional silence and passivity" to support adherence to what everybody agreed was an exceedingly anomalous precedent. 407 U.S. at 283. So, too, in *Canada Packers, Ltd.* v. *Atchison, T. & S.F.R.Co.*, 385 U.S. 182, 184 (1966), the Court followed questionable precedent which Congress had been invited to overrule but had not. In *Joint Industry Board* v. *United States*, 391 U.S. 224, 228-29 (1968), the Court preserved a challenged 1959 decision where Congress in the interim had frequently amended the statute but had not enacted proposals to reverse the Court. And in *Walling* v. *Halliburton Co.*, 331 U.S. 17, 25 (1947), the Court declined to overrule a questionable precedent where Congress had let the decision stand and the parties "had regulated their affairs on the faith of it."

The present case is much stronger than these, for as demonstrated above, *Jewell-LaSalle* is not an anomaly. Unlike the Court's concededly "aberrational" treatment of the reserve clause in *Federal Baseball*, *Jewell-LaSalle* won the support of the entire Court, remained unquestioned for decades, and has been followed throughout the world. Indeed, application of the "functional" approach of the

CATV cases suggests that *Jewell-LaSalle* was correctly decided, for the functional equivalent of the conduct in *Jewell-LaSalle* is not the private citizen singing in his shower or watching television in his living room, but commercial use in public places of background music services, records, or live orchestras. And whereas the baseball owners knew for a quarter century that Congress might at any time accept the Court's blunt invitation to strip them of antitrust immunity, the nation's composers, authors and music publishers have had no reason to believe that either Court or Congress would overturn *Jewell-LaSalle.*

Consider the legislative history in some detail. In the years immediately following *Jewell-LaSalle,* numerous bills were introduced to offset the impact of the decision. None passed into law. The first bill, H.R. 12549, 71st Cong., 3d Sess., was introduced in 1931. Section 1(g) called for an exemption for the reception of music by radio receivers except where an admission charge or service fee is assessed by the set owner. This bill passed the House, but failed in the Senate.* In 1932 six bills were introduced, Section 12 of each providing exemptions for the reception of any copyrighted work "by the use of receiving, reproducing, or distributing apparatus," absent an admission or similar charge. H.R. 10364, H.R. 10740, H.R. 10976, H.R. 11948, H.R. 12094, and H.R. 12425 (72d Cong., 2d Sess. 1932). Only one of these bills, H.R. 12094, was reported out of committe; none obtained the assent of the House. In 1935 another bill

* Note that even this and subsequent proposals do not dispute that radio reception and reproduction in a public place is conceptually a "performance." They simply exempt the "performance" from the statutory obligation, and then only where no fee is charged.

was introduced to provide an exemption for reception of a copyrighted work "by the use of a radio receiving set, wired radio or other receiving, reproducing, or distributing apparatus." S. 3047 (74th Cong., 1st Sess. 1935) passed the Senate but failed in the House, and failed again when reintroduced in 1937. S. 7, S. 2031, H.R. 2695, H.R. 3699, H.R. 5275 (75th Cong., 1st Sess. 1937).

In 1940 opponents of *Jewell-LaSalle* changed direction. H.R. 8263 and H.R. 9665 (76th Cong., 2d Sess. 1940) would have reduced the amount of damages for infringement of musical compositions "played in hotels or restaurants" to $10, if there were no entrance fee or cover or similar charge. Neither bill emerged from committee. H.R. 3456 (77th Cong., 1st Sess. 1941) proposed remedies against combinations of copyright owners by conferring jurisdiction upon the Federal Trade Commission to fix fees when the parties could not agree. This, too, was not acted upon.

Finally, the last efforts significantly to curtail the impact of *Jewell-LaSalle* came in 1957 when H.R. 673 and H.R. 4572 (85th Cong., 1st Sess. 1957) proposed that a radio, television, or phonograph record reproduction—in a hotel only—"shall not be deemed a public performance for profit." Both died in committee.

All copyright revision bills since 1957 have sought to codify *Jewell-LaSalle,* rather than circumscribe it. A series of such bills have been introduced in successive Congresses since 1964. One, H.R. 2512, 90th Cong., 1st Sess. (1967), passed the House in 1967. Another, S. 1361, 93d Cong., 2d Sess. (1974), passed the Senate in 1974.* All

* The other bills were H.R. 4347, H.R. 5680, H.R. 6831 and H.R. 6835, 89th Cong., 1st Sess. (1965); S.597, 90th Cong., 1st Sess. (1967); S.543, 91st Cong., 1st Sess. (1969); and S.644, 92nd Cong., 1st Sess. (1971).

follow *Jewell-LaSalle* in defining the reproduction of radio music over loudspeakers in a public place as a "performance." Authorization from the copyright owner is required except where the "performance" is through single radio receivers of the kind commonly used in private homes, unconnected to additional loudspeakers. The exception reflects ASCAP's historic practice of not requiring licenses from "Mom and Pop" stores using home-type radios without additional loudspeakers.

S. 1361, adopted by the Senate by a vote of 70 to 1 on September 9, 1974, is illustrative. Section 106 of S. 1361 (S. 22 in the present Congress) would confer upon a copyright owner the exclusive right to, and to authorize, the public performance of copyrighted works. Section 110 would provide that

> "Notwithstanding the provisions of section 106, the following are not infringements of copyright . . .
>
> (5) communication embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless:
>
> (A) a direct charge is made to see or hear the transmission; or
>
> (B) the transmission thus received is further transmitted to the public;"

This same formula had previously been adopted by the House in 1967. See Section 110(5) of H.R. 2512. It has not been controversial, and is highly likely to form a part of any revised Copyright Act. S.1361 would have been enacted into law by now were there not a continuing dispute about the treatment to be accorded CATV.

The significance of these legislative proposals is two-fold. First, these bills reflect the modern judgment of both Houses of Congress that reception in public places of copyrighted music on a radio receiver *is* a "performance," both analytically and from the view of legislative policy. Even reception on a small radio receiver, without additional loudspeakers, of the type used in a private home *is* deemed a "performance," and subject to copyright liability where the set owner charges a fee to hear the broadcast.

Second, it is noteworthy that modern legislative draftsmen do not find it anomalous to provide different treatment for radio reception of copyrighted music and for the functions performed by CATV systems.* Each of the recent proposals in the Congress deals separately with the problem of CATV transmissions. Some bills delegate to the Federal Communications Commission authority to require compensation by CATV systems to copyright proprietors. S.1361 declares CATV operations a "performance," provides for compulsory licensing, and mandates a complex schedule of royalties. If there is any present intent in the Congress to overturn copyright decisions of this Court, it is the CATV decisions that are at hazard, not *Jewell-LaSalle*.

With respect to completed legislative action, Congress has since 1931 enacted more than two dozen amendments to the Copyright Act of 1909. In no instance has any amendment impaired the viability of *Jewell-LaSalle*. See App. H1-2 hereto.

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* The British Copyright Act of 1956 also provides disparate treatment for the two types of conduct. Use of a radio in a public place is a "performance," §48(6), whereas "the causing of a work or other subject-matter to be transmitted to subscribers to a diffusion service, shall not be taken to constitute performance." §48(5).

To the extent that Congress has spoken through legislation, through serious and well-supported legislative proposals such as S.1361, and through refusals to act, its position has been consistent. *Jewell-LaSalle* has become an integral part of our copyright law, with the full concurrence of the Congress. It is this Court's policy to give weight to such a legislative judgment.

Conclusion

Jewell-LaSalle controls this case. *Jewell-LaSalle* has not been overruled. A "functional" test leads inexorably to the conclusion that commercial establishments which use radio receivers and loudspeakers as a substitute for live orchestras, records, or background music services are engaged in equivalent conduct and should be treated the same. The intricate contractual network legitimately and justifiably developed in reliance upon the decision in *Jewell-LaSalle* should be vindicated. And congressional action and inaction over the past 40 years leave no room for respondent's arguments in support of the decision below.

Music in America must not become the victim of a wooden jurisprudence. The fragile economic infrastructure that supports our composers, authors and music publishers must be preserved against erosion by the use of talismanic phrases torn out of context from this Court's CATV decisions. There is no need to inflict upon so im-

portant a cultural institution as music the damage threatened by the decision below. Indeed, every sound reason suggests that the decision be reversed.

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January, 1975

Appendix A A1

THE PERFORMING RIGHT SOCIETY LIMITED
An Association of Composers, Authors and Publishers of Music
29/33 Berners Street, London W1P 4AA
Telephone: 01-580 5544

STANDARD TARIFF "H"

IMPORTANT NOTICE: By agreement with a negotiating committee representing the Hotels' and Restaurants' Association, the Caterers' Association and the Music Users' Council, all charges calculated pursuant to tariff "H" are subject to a 25% surcharge with effect from the 6th September 1971.

(1) Scope of Tariff

This tariff applies to restaurants, hotel lounges open to the general public, non-residential road-houses, cafés, espresso bars, ice-cream parlours, tea-rooms, refreshment chalets, and similar premises, but does *not* apply—

(i) where the expenditure on live performers exceeds £1,000 per annum, as such cases fall under Tariff "E";

(ii) to residential hotels, unless the part where music is played is open to the general public;

(iii) to premises where there is a specific admission charge to that part where music is played (except dances, covered by paragraph (4) (ii) below).

(2) Applications

(a) Applicants for a licence under this tariff are required to give the Society such information on the Society's appropriate form as may be necessary to enable the Society to decide whether the tariff is applicable.

(b) The Society is not bound to offer a licence or permit under this tariff in respect of any performances unless application has been made in advance of the performance.

(3) Definitions

In this tariff—

(a) "Live performers" means performers of musical instruments and singers, including orchestra conductors or leaders, whether or not they combine in their performance other activities such as dancing or acting as compères or commères.

(b) "Mechanical performance" means performance by means of a record player (that is, any gramophone or other contrivance for playing musical works recorded on a physical support, on whatever substance and in whatever form the recording may be made, other than a coin-operated gramophone ("juke box" or "Cine box"), or by means of a radio or television set operated on the premises, or by diffusion through a loudspeaker, however conveyed, from another part of the premises or from a source outside the premises.

(4) Live Performers

Annual royalties payable when music is played by live performers:—

(i) Dinner dances, supper dances, banquets and similar functions for which there is no specific separate admission charge for dancing:
52½p per function for every 100 (or part of 100) persons catered for.

(ii) Ordinary dances:

(a) where the admission charge does not exceed 35p per person: 52½p per dance for every 100 (or part of 100) persons admitted.

(b) where the admission charge exceeds 35p the above-mentioned royalty is increased in proportion to the amount by which the charge exceeds 35p.

(iii) For all other occasions not covered by (i) or (ii) of this paragraph (4) the royalty is 75p for music on one night a week for each seating capacity unit of 5 persons for any number of performers (e.g. a restaurant with music on three nights a week and a seating capacity of 50 will pay:

3 (nights) x 10 (capacity units) x 75p=£22.50 (subject to (1) (i) above)).

When the music to which this paragraph (4) (iii) applies is played only during a limited season in each year, the annual royalty is adjusted in proportion to the number of weeks during which performances take place, and by an addition of 15% of the reduced amount.

(5) Mechanical Performance

Annual royalties payable for mechanical performances of music:—

	Record player alone or with radio and/or television	Radio and/or television alone
	per annum	per annum
Premises with not more than 15 seats	£6.00	£4.00
For each additional 10 seats or part thereof up to 75	£2.50	£1.50
For each additional 10 seats or part thereof over 75 up to 125	£2.25	£1.35
For each additional 10 seats or part thereof over 125	£2.12½	£1.27½

The foregoing scale (Part (5) of this tariff) is subject to the following:—

(i) Where there is a television set alone the maximum royalty payable is £6.00 per annum.

(ii) Where the premises are open only during a limited season in each year, or part of the seating capacity is in use only during a limited season, the annual royalty is adjusted by a proportionate reduction and by an addition of 15% of the reduced amount.

(iii) Where the seats on the premises do not exceed 10 and the only commodities sold are light refreshments, confectionery or similar goods, the Society may, in its discretion, reduce the minimum royalty of £6.00 set out in the first column above to £4.30.

(iv) Where there are facilities for dancing the royalty is increased by 50%.

(6) Commencement

This tariff, which supersedes all previous editions of this tariff, shall apply as from 6th January, 1966.

(7) Value Added Tax

ALL ROYALTIES CALCULATED UNDER THIS TARIFF ARE SUBJECT TO AN ADJUSTMENT SO AS TO INCLUDE WITHIN THE AMOUNT OR AMOUNTS PAYABLE THEREUNDER A SUM IN RESPECT OF VALUE ADDED TAX AT THE RELEVANT RATE.

Appendix B B1

THE PERFORMING RIGHT SOCIETY LIMITED

An Association of Composers, Authors and Publishers of Music

29/33 Berners Street, London, W1P 4AA

Telephone: 01-580 5544

STANDARD TARIFF "RH"

IMPORTANT NOTICE: By agreement with a negotiating committee representing the Hotels' and Restaurants' Association, the Caterers' Association and the Music Users' Council, all charges pursuant to Section 4 (b) and (c) of tariff "RH" are subject to a 25% surcharge with effect from the 6th January 1972.

(1) Scope of Tariff

This tariff applies to musical performances provided either by performers in person or by mechanical means as an amenity for residents at a hotel, boarding-house or guest-house in the United Kingdom and Republic of Ireland.

It does not apply, except as provided under paragraph 4(b), to:

(i) Performances by performers in person where the gross annual expenditure by way of remuneration or consideration in lieu of remuneration to performers, as defined in paragraph 3 below, exceeds £1,000 per annum, as such performances are licensed under the Society's Tariff E.

(ii) Performances in ballrooms, dance halls, restaurants, cafes, bars, lounges or other places open to the general public forming part of hotel, boarding or guest-house premises, for which royalties are payable pursuant to the Society's standard tariffs applicable to such performances.

(iii) Performances by means of coin-operated gramophones ('juke-boxes' or 'film boxes'), royalties for which are payable pursuant to the Society's standard tariffs for performances by means of these instruments.

(iv) Performances by means of apparatus installed under an agreement with an independent contractor for the provision of a background music service, royalties for which are payable under the Society's tariff for such a service.

(2) Applications

(a) Applicants for a licence under this tariff are required to give the Society such information on the Society's appropriate form as may be necessary.

(b) The Society is not bound to offer a licence or permit under this tariff in respect of any performances unless application has been made in advance of the performance.

(3) **Definitions**

(a) In this tariff "performers" mean singers and performers of musical instruments, and includes orchestra conductors or leaders, whether or not they combine in their performance other activities such as dancing or acting as compères or commères.

(b) "Record player" means any gramophone or other contrivance for playing musical works recorded on a physical support, on whatever substance or in whatever form the recording be made, other than a coin-operated gramophone ('juke-box' or 'film box').

(4) **Charges for performances by performers in person**

(a) Where music is provided as an amenity for residents, including for dancing:

25p per occasion for every 30 (or part of 30) bedrooms.

(b) Where music is provided at "catered functions" such as dinner dances, supper dances, banquets and similar functions with musical entertainment for which there is no separate admission charge for dancing or other musical entertainment, regardless of whether the musical entertainment is provided by the management or the organisers of the functions:

52½p per function for every 100 (or part of 100) persons catered for.

(c) Ordinary dances:

(i) where the admission charge does not exceed 35p per person: 52½p per dance for every 100 (or part of 100) persons admitted;

(ii) where the admission charge exceeds 35p the above-mentioned royalty is increased in proportion to the amount by which the charge exceeds 35p.

The foregoing scales of charge are subject to a minimum charge of £1.50.

(5) Charges for performances by means of radio and/or television receiving sets, or by radio loudspeakers and/or television screens operated by a central apparatus controlled by the management or provided by a broadcast relay or diffusion service:

For first 15 bedrooms	£2 per annum
For each additional 15 or part of 15 bedrooms	£2 per annum

(6) **Charges for performances by means of record player (as defined), with or without radio and/or television receiving sets in addition:**

For first 15 bedrooms	£4.50 per annum
For each additional 15 or part of 15 bedrooms ...	£4.50 per annum

The foregoing scale (Parts 5 and 6 of this tariff) is subject to the following:

(i) For establishments which are not open for more than 26 weeks in the year a rebate of 33⅓ % will be allowed from the tariff charge, subject to the minimum charges specified below.

(ii) Minimum charges are:

Radio and/or television	£2
Record player (as defined)	£4.50

(7) **Commencement**

This tariff, which supersedes all previous editions of this tariff, shall apply as from 6th January, 1969.

(8) **Value Added Tax**

ALL ROYALTIES CALCULATED UNDER THIS TARIFF ARE SUBJECT TO AN ADJUSTMENT SO AS TO INCLUDE WITHIN THE AMOUNT OR AMOUNTS PAYABLE THEREUNDER A SUM IN RESPECT OF VALUE ADDED TAX AT THE RELEVANT RATE.

500/C/4-74

Appendix C C1

29/33 Berners Street, London W1P 4AA
Telephone: 01-580 5544
Telegrams: Performight London W1

The Performing Right Society Limited An association of composers, authors and publishers of music

our ref your ref

NOTICE TO LICENSEES

RE: TARIFFS "BP", "E", "H" & "RH"

1. The Society has negotiated with the British Hotels, Restaurants & Caterers Association and the Music Users' Council revised charges for the use of copyright music in hotels and restaurants under each of the above tariffs, to come into effect on 6th January 1975.

2. Those charges which are expressed as fixed monetary units have been revised to take into account the substantial fall in the purchasing power of money since the last revision of these rates was negotiated in 1971. (1969 in the case of tariff "RH"). Full details of all the revised charges will be found on the attached schedule.

3. The procedure that the Society will adopt for implementing the new rates will be as follows:-

(i) Invoices under licences for which the next annual renewal date is 6th January 1975 will show simply the revised annual royalty;

(ii) invoices raised under licences for which the renewal date is the 6th February 1975, and the 6th of each following month will show the revised annual royalty for the full licence year plus the proportionate amount of the increase for the period from the 6th January 1975 to the 5th of the licence renewal month.

Example: Restaurant seating 50 persons - performers on 3 nights weekly - Assessment under tariff H Section 4(iii)

Licence renewal date 6th June 1975

(Annual royalty under old tariff H : £28.12 (including 1971 surcharge of 25%).

Revised annual royalty under new tariff H for licence year 6th June 1975 to 5th June 1976 .. .. £39.00

plus proportion of annual increase from 6th January 1975 to 5th June 1975 = 5/12ths x £10.88 p.a. (i.e. £39.00 - £28.12) .. .. £ 4.53

TOTAL ROYALTY: £43.53

4. It has been agreed with the BHRCA that the revised tariffs will remain unchanged for two years, i.e. until January 1977, unless in the meantime the cost-of-living (as measured by the Index of Retail Prices) increases by 30% over its present level in which event they will be subject to further review.

5. This "Notice to Licensees" constitutes the prescribed notice of the revised tariffs pursuant to the licence-contract currently in force between the Society and yourself.

P.T.O

President: Sir Arthur Bliss CH KCVO Mus D.LLD Vice President: Vivian Ellis President of Honour: Leslie A Boosey
General Manager: M J Freegard FCIS Legal Adviser: DAS de Freitas MA Secretary: G M Neighbour MA
Registered in London, No. 134386 Registered Office at above address

Appendix C C2

6. The Society much regrets the necessity to increase its charges but is sure you will appreciate that composers have suffered from inflation as much as any other section of the community, and that the Society has shown considerable restraint in not increasing its charges at all under these tariffs over the past three years - a period in which we have seen substantial increases in virtually all other costs and charges in every sphere of life.

L. F. SIDERY
LICENSING CONTROLLER: OPERATIONS

DECEMBER 1974

Appendix C C3

SCHEDULE OF REVISED CHARGES UNDER TARIFFS "BF", "E", "H" AND "RS" AS FROM 6TH JANUARY, 1975

TARIFF BF - For banqueting or other "catered" functions with music, including dinner dances etc., with a charge inclusive of a meal, which do not qualify under any other tariff.

For each 100 (or part of 100) persons catered for - 90p per function.

TARIFF E - Hotels and Restaurants where the annual expenditure on performers in person exceeds £1,000 a year or £20 per week when performances are seasonal.

Section 2(A)(i) In respect of house performers:-

2½% on the first £5,000
2% on the next £5,000
1½% on the next £5,000
1% on any expenditure above £15,000

Section 2(A)(ii) In respect of other artistes:-

1½% for the first £5,000
1% for the next £5,000
¾% for the next £5,000
½% for the remainder.

Section 2(B)(iii) only

For each 100 (or part of 100) persons catered for - 90p per function.

TARIFF H - Restaurants, hotel lounges open to general public, non-residential road-houses, tea-rooms and similar premises.

Section (4) Live performers.

(i) Catered Functions:
For each 100(or part of 100) persons catered for - 90p per function.

(ii) Ordinary Dances:
For each 100 (or part of 100) persons admitted - 90p per dance.

(iii) For all other occasions not covered in (i) or (ii) above the royalty is £1.30 for music on one night a week for each seating capacity unit of 5 persons for any number of performers.

When the music to which this Section 4(iii) applies is played only during a limited season in each year, the annual royalty is adjusted in proportion to the number of weeks during which the performances take place, and by an addition of 15% of the reduced amount.

Section (5) Mechanical Performance.

	Record-player alone or with radio and/or TV	Radio and/or TV alone
	per annum	per annum
Premises with not more than 15 seats	£10.50	£7.00
For each additional 10 seats or part thereof up to 75	4.35	2.60
For each additional 10 seats or part thereof over 75 up to 125	4.00	2.35
For each additional 10 seats or part thereof over 125	3.70	2.25

The foregoing scale (Section (5) of this tariff) is subject to the following:-

(i) Where there is a television alone the maximum royalty payable is £10.50 per annum.

(ii) Where the premises are open only during a limited season in each year, or part of the seating capacity is in use only during a limited season, the annual royalty is adjusted by a proportionate reduction and by an addition of 15% of the reduced amount.

(iii) Where the seats on the premises do not exceed 10 and the only commodities sold are light refreshments, confectionery or similar goods, the Society may, in its discretion, reduce the minimum royalty of £10.50 set out in the first column above to £7.85.

(iv) Where there are facilities for dancing the royalty is increased by 50%.

TARIFF RH - Musical performances either by performers in person or by mechanical means as an amenity for residents at an hotel, boarding house or guest house.

Section (4) Live Performers

(a) Where music is provided as an amenity for residents, including for dancing:

For every 30 (or part of 30) bedrooms - 45p per occasion.

(b) Catered functions:

For each 100 (or part of 100) persons catered for: 90p per function.

(c) Ordinary dances:

For each 100 (or part of 100) persons admitted - 90p per dance.

The foregoing scales of charge are subject to a minimum charge of £2.60.

Section (5)

Charges for performances by means of radio and/or television receiving sets, or by radio loudspeakers and/or television screens operated by a central apparatus controlled by the management or provided by a broadcast relay or diffusion service:

For the first 15 bedrooms .. .. £3.50 per annum

For each additional 15 or part of 15 bedrooms .. .. £3.50 per annum

Section (6)

Charges for performances by means of a record-player, with or without radio and/or television receiving sets in addition:

For the first 15 bedrooms .. .. £7.85 per annum

For each additional 15 or part of 15 bedrooms .. .. £7.85 per annum

The foregoing scale (Sections (5) and (6) of the tariff) is subject to the following:

(i) For establishments which are not open for more than 26 weeks in the year a rebate of 33⅓% will be allowed from the tariff charge, subject to the minimum charges specified below.

(ii) Minimum charges are:-

Radio and/or television .. .. £3.50 per annum

Record-player with or without radio/TV .. .. £7.85 per annum

APRA

AUSTRALASIAN PERFORMING RIGHT ASSOCIATION LIMITED

An Association of Composers, Authors and Publishers of Music
Established 1926, Inc. in N.S.W. With International Affiliations
P.O. Box 291, Crows Nest, N.S.W., 2065. Telephone 439 8666. Cables & Telegrams 'APRA', 29-27 Albany Street, Crows Nest, N.S.W., 2065, Australia.

NOTICE

APRA's authority is necessary for the use of music in certain circumstances if infringement of copyright is to be avoided.

Under the provisions of the Commonwealth Copyright Act the permission of the owners of the copyright in musical works, whether of local or overseas origin, is necessary before the music is performed in public or broadcast or telecast or transmitted to subscribers to a diffusion service as in the case of background music. Without such permission those responsible risk the consequences of infringing copyright.

This brochure has been prepared to help you understand the meaning of a performance of music in public and to explain how you can obtain APRA's authority in meeting your obligations under the law.

In general, performances of music "in public" are those given outside the precincts of the home. The means of performance are immaterial and it does not matter whether recordings, tapes, radios or television sets are employed or whether the music is played "live" by musicians. Similarly, it does not matter why the performance is given, where it is given or whether any charge is made. What does however matter is the playing of music in other than domestic circumstances. Those responsible must obtain permission: this means the proprietors, their managers or agents, or the occupiers of the premises concerned; or even the organisers themselves for locations not already covered under prior arrangements with APRA.

Throughout the world this permission may be obtained from central authorities, such as APRA. These centres have been set up in each country by the composers, publishers and other owners of the copyright in music to deal with the performing, broadcasting, telecasting and diffusing rights in their works. Such organisations grant to each other reciprocal rights which means that in its own territory each represents the right of composers, publishers and other copyright owners from all over the world. Consequently music users can readily obtain permission to perform music in public from a single authority in their own territory on the basis of an established scale of fees. This service is essential to the music user who would otherwise have to apply and negotiate in all parts of the world and with the copyright owners individually for permission to perform each piece of music on each occasion. It is equally essential to the composers and publishers for they could not, as individuals, adequately protect and administer their interests.

APRA is the central authority in Australia, New Zealand and the South Pacific region representing the interests of composers, authors and publishers of music throughout the world as well as its own members. Because the term of copyright in music is the lifetime of the writer and a further period of at least 50 years it is virtually impossible to have performances, particularly of light and popular music, without making extensive use of APRA's Repertoire.

APRA's licensing schemes for certain of these performances are detailed herein. For additional information please see the back of the attached form.

RETAIN

Appendix D D2

LICENCES

You are granted a licence which continues from year to year for payment in advance of an annual fee. For single or short term performances you are issued with a Permit. Your fees are assessed in accordance with graded tariffs appropriate to the means of performance or its purpose. Wherever possible, tariffs are negotiated with representative bodies or have been decided in arbitration.

We have no connection or dealings with the performers as such, nor are they expected to obtain licences. This responsibility rests with you if you engage their services or you are the occupier of the place where they perform, for example:—

HALLS OF ALL KINDS, HOTELS & MOTELS, THEATRES, SOCIAL & SPORTING CLUBS, RESTAURANTS, COFFEE LOUNGES, SPORTS & SHOWGROUNDS, SHOPPING CENTRES, ETC.

Radio & Television Sets

The A.B.C. and the commercial radio and television stations are all licensed by us for their transmissions of music and for the reception and use of those programmes in the home. These licences do not cover the use of such programmes elsewhere. You need an individual licence from us where radios and television sets (no matter who owns them) are used in places such as those listed above and also, as further examples in:—

SHOPS, FACTORIES, OFFICES, PASSENGER COACHES & SHIPS, GARAGES, ETC.

Recordings

Like radio and television programmes, recordings and tapes may be freely used in the home but cannot be used to provide a public performance of copyright music without our licence. Making your own recordings or "dubbing" from existing ones is something for which authority must be obtained from the owners of the reproduction rights in the music as well as the owners of the copyright in the master recording itself. These rights are not exercised by APRA and our licence in no way authorises such practices.

Juke Boxes & Background Music Systems

The operators of these machines and systems usually make the necessary licensing arrangements directly with us. If not, it is the responsibility of the occupier of the premises to do so.

LICENSING SCHEMES

APRA authorises the use of its repertoire upon completion of a standard licence form and payment of fees annually in advance under the following licensing schemes, amongst others, currently in force:—

TARIFF	MEANS	RATE OF FEES	QUALIFICATIONS
J	Juke Boxes	$20 each plus 25c per speaker, p.a.	Tariffs "J" and "M" are for music used for background or listening purposes only and exclude any performances used to accompany dancing, mime and other shows, skating or other similar activity
M	Background Music and/or Record and Tape Players	$15 plus 25c per speaker, p.a.	
M	Television and/or Radio Sets	$10 each plus 25c per speaker, p.a.	No charge is made for additional sets operating in the same lounge, bar or area
R	Musicians and/or Vocalists	2% of the gross annual expenditure thereon with a minimum of $3	Where the performers are paid in kind or give their services free or for less than the usual rates, provision must be made for this at standard rates.

*15c should be added to the initial fee for Govt. Stamp Duty.

APRA RESERVES THE RIGHT TO REFUSE A LICENCE UNDER THE ABOVE TERMS WHERE THE CONDITIONS OF PRIOR PERMISSION AND PAYMENT IN ADVANCE HAVE NOT BEEN MET.

Information is available upon application concerning the rates for single and short term performances and for other tariffs including broadcasts, telecasts, diffusions and —

C Cinemas
D Dance Studios
H Dance Halls, Discotheques
K Skating Rinks
L Theatres
S Sports meeting; Processions
V Concerts, Shows

RETURN

Appendix D D3

APPLICATION

Please complete, detach and forward together with your remittance to:—
THE LICENSING DEPARTMENT, A.P.R.A. LTD., P.O. BOX 291, CROWS NEST, N.S.W., 2065

1. Name of Premises _____

   Address of Premises _____

   Nature of Premises _____

2. Please tick the appropriate square to show the means of performance and add the number of instruments or speakers, the operator's name in the case of juke boxes and background music systems, and the date music commenced.

MECHANICAL PERFORMANCES		NUMBER	NUMBER OF ADDITIONAL SPEAKERS	OWNER OR OPERATOR'S NAME	DATE MUSIC COMMENCED
a) Juke Boxes	☐	_____	_____	_____	_____
b) Background Music System	☐		_____	_____	_____
c) Record Player	☐		_____		_____
d) Tape Recorder	☐		_____		_____
e) Radio	☐	_____	_____		_____
f) Television Set	☐	_____	_____		_____
LIVE PERFORMANCES					
Musicians and/or Vocalists	☐	Please state estimated expenditure per annum plus an appropriate allowance where services are given free or for less than normal rates or are paid for in kind.		$ _____	_____

3. I/We hereby apply for your licence. I/We hereby declare the foregoing statement is fully and faithfully made and I/We agree that it shall be the basis of the contract between me/us and APRA.

   Full Name of Applicant _____

   Applicant's or Authorised Officer's signature _____ Date _____

   Address for correspondence and accounts _____

On receiving your application and/or remittance your licence form will be prepared and sent (with a copy for your own records) for you to sign and return. Your licence provides amongst other things for us to be notified of any future significant change in the above particulars so that your fees can be adjusted.

Where two or more mechanical instruments are used but the performances are relayed through the same set of speakers show the total number of speakers involved only once when completing your application.

FOR

OFFICE

USE

ONLY

APPLICATION/NOTES

Appendix D D4

NOTES

Exemptions

Authority is not needed for the playing of music at private parties held in the home and similar family celebrations but it is needed for so-called "private" functions even though admission to them is limited to staff or clients or members of a club or society. Authority is not needed for performances exclusively in the staff living quarters of hotels and motels but it is needed where music is performed in those areas available for use by the guests or the public in general.

Performances

The Copyright Act defines these as including "..... any mode of visual or aural presentation, whether the presentation is by the operation of wireless telegraphy apparatus, by the exhibition of a cinematograph film, by the use of a record or by any other means: ..."

Public Performances

What constitutes a public performance is a question of fact. However, case law in general holds it to be one where those present are other than a family group and its guests.

Sheet Music

As with recordings, sheet music may be freely used in the home. However, its purchase or possession does not convey the right to give a public performance from it. Where such performances are given without using sheet music this in no way alters the need for APRA's authority.

Apra's Constitution

APRA was established in 1926. It is a company limited by guarantee, having no share capital and paying no dividends. Policy and administration are controlled by a Board of Publishers and Writers elected from and by APRA's members. After deduction of administrative expenses, all fees collected are distributed throughout the world to the owners of the compositions used. In this way, the authors and the composers are remunerated in direct ratio to the use of their music. Programme returns prepared by APRA's major licensees to show details of their daily use of music provide the basis for royalty distributions. Other music users need not provide these lists unless specifically requested to do so.

Apra's Repertoire

It is impossible to see a complete list of works controlled by APRA. The total number of works in our international repertoire is countless. If a catalogue of them all were feasible its cost to purchasers would be prohibitive and it obviously could not include the new music which comes into the repertoire every day. A Repertoire Guide is available upon request and enquiries about specific works can readily be answered.

Appendix E E1

S-A-C-E-M

SOCIÉTÉ DES AUTEURS, COMPOSITEURS ET ÉDITEURS DE MUSIQUE

Tél. 744-75-25 - SIÈGE SOCIAL : 11 RUE CHAPTAL - PARIS (IXe) - TÉLÉGR. MUSICA-PARIS - CH. P. PARIS 513-27

- CAFES - HOTELS - RESTAURANTS -

- Barème "TELEVISION" - Auditions seules -

"TELEVISION" Rate Schedule - Auditions only

TARIF MENSUEL
MONTHLY RATE

SAISONNIERS
SEASONAL

Apéritif	Année Year	STATIONS 1st category 1ère Catégorie H. S. P.* T. G.**	1st category 1ère Catégorie H. S. P.* F.N.I.H.***	2nd category 2ème catégorie H. S. P. T. G.	2nd category 2ème catégorie H. S. P. F.N.I.H.	3rd category 3ème catégorie H. S. P. T. G.	3rd category 3ème catégorie H. S. P. F.N.I.H.
1,—	I	28	19	21	14	16	12
	II	35	23	26	18	23	15
1,01 à to 1,20	I	30	20	25	17	21	14
	II	38	25	31	21	26	18
1,21 à 1,40	I	35	23	30	20	23	15
	II	43	29	36	24	30	20
1,41 à 1,60	I	36	24	31	21	28	19
	II	46	31	40	26	35	23
1,61 à 2,—	I	43	29	38	25	35	23
	II	54	36	48	32	43	29
2,01 à 2,50	I	50	33	45	30	41	28
	II	63	42	56	37	51	34

* H.S.P. =
** T.G. = General Rate
*** F.N.I.H. = Nat'l Federation of Hotel Industry

Appendix E E2

- TARIF ANNUEL - PARIS T.S.F. - Auditions seules - PROVINCES
ANNUAL RATE RADIO RATE SCHEDULE - Auditions only PROVINCES

Nbre de Places Seats	Prix Price de l'apéritif	Jusqu'à To 1.500		1.501 to à 5.000		5.001 to à 20.000		20.001 to à 40.000		40.001 to à 70.000		Plus Over de 70.000	
		T.G.*	FNIH**	T.G.	FNIH	T.G.	FNIH	T.G.	FNIH	T.G.	FNIH	T.G.	FNIH
30	0,90	24	16	29	19	35	23	42	28	51	33	60	40
	1,00	31	21	37	25	45	30	54	36	65	43	78	52
	1,20	41	27	49	33	59	40	71	47	86	57	103	69
	1,40	51	34	61	41	74	49	87	58	107	71	128	85
	1,60	61	41	73	48	87	58	104	69	127	85	153	102
	2,00	81	54	96	64	115	77	137	91	168	112	202	135
	2,50	101	67	119	79	144	96	170	113	210	140	252	168
31 à to 60	0,90	31	21	37	25	45	30	54	36	65	43	78	52
	1,00	39	26	47	31	56	37	67	45	80	54	96	65
	1,20	51	34	60	40	73	48	87	58	104	70	125	84
	1,40	62	41	74	49	89	59	107	71	129	86	153	102
	1,60	74	49	87	58	105	70	127	85	152	101	181	121
	2,00	97	64	114	76	139	92	167	111	198	132	238	158
	2,50	120	80	140	93	172	114	206	137	244	162	294	196
61 à to 100	0,90	39	26	47	31	56	37	67	45	80	54	96	65
	1,00	46	31	56	37	67	44	80	53	96	64	115	76
	1,20	59	40	71	47	86	57	103	69	123	82	148	99
	1,40	73	48	87	58	106	70	127	85	152	101	181	121
	1,60	86	57	104	69	125	84	152	101	180	120	214	143
	2,00	112	75	137	91	165	110	201	134	236	157	280	187
	2,50	139	92	170	113	205	136	251	167	292	195	346	231
101 à to 150	0,90	46	31	56	37	67	44	80	53	96	64	115	76
	1,00	54	36	65	43	78	52	93	62	112	75	135	90
	1,20	70	47	85	56	102	67	122	81	146	97	175	117
	1,40	87	58	104	69	124	82	144	100	178	119	214	143
	1,60	103	69	124	82	147	98	161	107	211	141	254	169
	2,00	136	91	163	109	193	129	217	145	277	185	333	222
	2,50	169	113	203	135	239	159	273	182	343	229	412	275
151 à to 200	0,90	54	36	64	43	77	51	92	62	111	74	134	89
	1,00	61	41	74	49	87	58	106	70	125	84	152	101
	1,20	67	52	93	62	111	74	134	89	158	106	191	128
	1,40	94	63	113	75	134	89	162	108	191	128	231	154
	1,60	111	74	133	89	157	104	190	126	224	150	271	180
	2,00	144	96	173	115	203	135	245	164	290	194	350	233
	2,50	177	118	212	141	249	166	302	201	356	238	429	286
201 à to 250	0,90	61	41	74	49	87	58	106	70	125	84	152	101
	1,00	68	46	82	55	98	65	119	79	140	93	170	113
	1,20	85	57	99	66	121	81	147	98	173	115	210	140
	1,40	101	68	115	77	144	96	175	117	206	137	249	166
	1,60	118	79	132	88	167	112	203	135	239	159	289	192
	2,00	151	101	165	110	213	142	259	173	305	203	368	245
	2,50	184	123	198	132	260	173	315	210	371	247	447	298
251 à to 300	0,90	68	46	82	55	98	65	119	79	140	93	170	113
	1,00	76	51	91	61	109	73	132	88	155	103	188	125
	1,20	92	62	108	72	132	88	160	107	188	125	228	152
	1,40	109	73	124	83	155	103	188	125	221	147	267	178
	1,60	125	84	141	94	178	119	216	144	254	169	307	205
	2,00	158	106	174	116	224	150	272	181	320	213	386	257
	2,50	191	128	207	138	271	180	328	219	386	257	465	310

101 - 2

* T.G. = General Rate
** FNIH = Nat'l Federation of Hotel Industry

Appendix E E3

- Barème "T.G.F."- Auditions seules -
"Radio" Rate Schedule - Auditions only

TARIF MENSUEL
MONTHLY RATE

SAISONNIERS
SEASONAL

Places Seats	Apéritif	STATIONS 1st category 1ère catégorie M. S. P. T. G.**	F.N.I.H.***	2nd category 2ème catégorie M. S. P. T. G.	F.N.I.H.	3rd category 3ème catégorie M. S. P. T. G.	F.N.I.H.
30	1,—	17	11	13	9	12	8
	1,20	20	13	15	10	13	9
	1,40	21	14	17	11	15	10
	1,60	23	15	18	12	17	11
	2,—	26	18	21	14	20	13
	2,50	31	21	26	18	25	17
31 à to 60	1,—	20	13	17	11	13	9
	1,20	21	14	18	12	15	10
	1,40	23	15	20	13	17	11
	1,60	25	17	21	14	18	12
	2,—	28	19	25	17	21	14
	2,50	33	22	30	20	26	18
61 à 100	1,—	23	15	20	13	15	10
	1,20	25	17	21	14	17	11
	1,40	26	18	23	15	18	12
	1,60	28	19	25	17	20	13
	2,—	31	21	28	19	23	15
	2,50	36	24	33	22	28	19
101 à 150	1,—	26	16	23	15	18	12
	1,20	28	19	25	17	20	13
	1,40	30	20	26	18	21	14
	1,60	31	21	28	19	23	15
	2,—	35	23	31	21	26	18
	2,50	40	26	36	24	31	21
151 à 200	1,—	31	21	26	18	23	15
	1,20	33	22	28	19	25	17
	1,40	35	23	30	20	26	18
	1,60	36	24	31	21	28	19
	2,00	40	26	35	23	31	21
	2,50	45	30	40	26	36	24
201 à 250	1,—	35	23	30	20	26	18
	1,20	36	24	31	21	28	19
	1,40	38	25	33	22	30	20
	1,60	40	26	35	23	31	21
	2,—	43	29	38	25	35	23
	2,50	48	31	43	29	40	26
251 à 300	1,—	33	25	33	22	30	20
	1,20	40	26	35	23	31	21
	1,40	41	28	36	24	33	22
	1,60	43	29	38	25	35	23
	2,—	46	31	41	28	38	25
	2,50	51	34	46	31	43	29

* N.S.P. =

** T.G. = General Rate

*** F.N.I.H. = Nat'l Federation of Hotel Industry

Appendix F F1

TRANSLATION

GEMA

I/7

1.1.1973
(4)

Rate Schedule R
for
Music Presentation thru Re-transmission of Radio Broadcasts

Rate Schedule for Blanket Contracts

Net Amounts without Turnover Tax

1. Rate Schedule

1. Restaurants, convention halls, mess halls, ice cream parlors and similar establishments

	Annual Lump Sum Rates per Presentation Area	Monthly Lump Sum Rates per Presentation Area
	(in German marks)	
Group A (Standard establishments with annual turnover not exceeding DM 32,000.00)	DM 18.00	DM 2.60
Group B (All other establishments)	DM 36.00	DM 5.20

Throughout the months stipulated in the contracts, no compensation for music presentation thru re-transmission of radio broadcasts in the same presentation area is required from restaurant owners who have concluded a blanket agreement with GEMA under Category I of Rate Schedule U, or pay GEMA an annual or monthly lump sum for their own permanent presentation by means of sound carriers in accordance with Paragraph III, subpar. 1 of Rate Schedule M-U.

If GEMA's license for the permanent re-transmission of music by means of an automatic device has been obtained by a third party by concluding a blanket agreement, the restaurant owner shall be exempt from paying a compensation for music presentation thru re-transmission of radio broadcasts in the same presentation area throughout the period covered by said third party's lump sum payments.

2. Public areas, waiting rooms, etc. not used for business

Area size in sq. m.	Annual Lump Sum Rates per Presentation Area	Monthly Lump Sum Rates per Presentation Area
a) up to 50 sq. m.	DM 12.00	DM 1.60
b) over 50 sq. m.	DM 18.00	DM 2.40

3. Omnibuses

Annual lump sum rate	DM 24.00	per vehicle
Monthly lump sum rate	DM 3.12	per vehicle

4. Other Places of Entertainment

For music presentation thru re-transmission of radio broadcasts in all other places of entertainment, Rate Schedule M-U shall apply.

II. General Provisions

1. Accounting

In each case the lump sum rates shall apply to the periods indicated.

For music presentation during a period of less than one month the minimum amounts shall be the monthly lump sum rates.

2. Prompt acquisition of License

The computation of rate schedules presupposes the previous conclusion of a blanket agreement, as required.

3. Annual Blanket Agreements - Method of Payment

The annual lump sum rates are payable in advance. Quarterly payments are required.

4. Scope of License

The license encompasses only the rights which GEMA is authorized to grant.

The license does not include the reproduction of re-transmitted compositions (by means of records, tapes, wires, etc.)

The lump sums shall be paid independently of the use made of the granted rights.

Published in the "Bundesanzeiger"
No. 57 dated 3-24-70, page 14 and
No. 21 dated 1-31-73, page 11.

Appendix F F3

TRANSLATION

GEMA

I/7

1.1.1973
(4)

Rate Schedule R
for
Music Presentation thru Re-transmission of Radio Broadcasts

Net Amounts without Turnover Tax

1. Rate Schedule

1. Restaurants, convention halls, mess halls, ice cream parlors and similar establishments

	Annual Lump Sum Rates per Presentation Area	Monthly Lump Sum Rates per Presentation Area
	(in German marks)	
Group A (Standard establishments with annual turnover not exceeding DM 32,000.00)	DM 22.50	DM 3.25
Group B (All other establishments)	DM 45.00	DM 6.50

Throughout the months stipulated in the contracts, no compensation for music presentation thru re-transmission of radio broadcasts in the same presentation area is required from restaurant owners who have concluded a blanket agreement with GEMA under Category I of Rate Schedule U, or pay GEMA an annual or monthly lump sum for their own permanent presentation by means of sound carriers in accordance with Paragraph III, subpar. 1 of Rate Schedule M-U.

If GEMA's license for the permanent re-transmission of music by means of an automatic device has been obtained by a third party by concluding a blanket agreement, the restaurant owner shall be exempt from paying a compensation for music presentation thru re-transmission of radio broadcasts in the same presentation area throughout the period covered by said third party's lump sum payments.

2. Public areas, waiting rooms, etc. not used for business

Area size in sq. m.	Annual Lump Sum Rates per Presentation Area	Monthly Lump Sum Rates per Presentation Area
a) up to 50 sq. m.	DM 15.00	DM 2.00
b) over 50 sq. m.	DM 22.50	DM 3.00

3. Omnibuses

Annual lump sum rate	DM 30.00	per vehicle
Monthly lump sum rate	DM 3.90	per vehicle

4. Other Places of Entertainment

For music presentation thru re-transmission of radio broadcasts in all other places of entertainment, Rate Schedule M-U shall apply.

II. General Provisions

1. Accounting

In each case the lump sum rates shall apply to the periods indicated.

For music presentation during a period of less than one month the minimum amounts shall be the monthly lump sum rates.

2. Prompt acquisition of License

The computation of rate schedules presupposes the previous conclusion of a blanket agreement, as required.

3. Annual Blanket Agreements - Method of Payment

The annual lump sum rates are payable in advance. Quarterly payments are required.

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The lump sums shall be paid independently of the use made of the granted rights.

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No. 57 dated 3-24-70, page 14 and
No. 21 dated 1-31-73, page 11.

Appendix G G1

93D CONGRESS
2D SESSION

S. 1361

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 12, 1974

Referred to the Committee on the Judiciary

AN ACT

For the general revisions of the Copyright Law, title 17 of the United States Code, and for other purposes.

Appendix G G2

§ 106. Exclusive rights in copyrighted works

Subject to sections 107 through 117, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

§ 110. Limitations on exclusive rights: Exemption of certain performances and displays

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

(1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made;

(2) performance of a nondramatic literary or musical work or display of a work, by or in the course of a transmission, if:

(A) the performance or display is a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution; and

(B) the performance or display is directly related and of material assistance to the teaching content of the transmission; and

(C) the transmission is made primarily for:

(i) reception in classrooms or similar places normally devoted to instruction, or

(ii) reception by persons to whom the transmission is directed because their disabilities or other special circumstances prevent their attendance in classrooms or similar places normally devoted to instruction, or

(iii) reception by officers or employees of governmental bodies as a part of their official duties or employment;

(3) performance of a nondramatic literary or musical work or of a dramatico-musical work of a religious nature, or display of a work, in the course of services at a place of worship or other religious assembly;

(4) performance of a nondramatic literary or musical work otherwise than in a transmission to the public without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organisers, if:

(A) there is no direct or indirect admission charge, or

(B) the proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for educational, religious, or charitable purposes and not for private financial gain, except where the copyright owner has served notice of his objections to the performance under the following conditions:

(i) The notice shall be in writing and signed by the copyright owner or his duly authorized agent; and

(ii) The notice shall be served on the person responsible for the performance at least seven days before the date of the performance, and shall state the reasons for his objections; and

(iii) The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation;

(5) communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless:

(A) a direct charge is made to see or hear the transmission; or

(B) the transmission thus received is further transmitted to the public;

(6) performance of a nondramatic musical work in the course of an annual agricultural or horticultural fair or exhibition conducted by a governmental body or a nonprofit agricultural or horticultural organization;

(7) performance of a nondramatic musical work by a vending establishment open to the public at large without any direct or indirect admission charge, where the sole purpose of the performance is to promote the retail sale of copies or phonorecords of the work and the performance is not transmitted beyond the place where the establishment is located.

§ 111. Limitations on exclusive rights: Secondary transmissions

(a) CERTAIN SECONDARY TRANSMISSIONS EXEMPTED.—The secondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of copyright if:

(1) the secondary transmission is not made by a cable system, and consists entirely of the relaying, by the management of a hotel, apartment house, or similar establishment, of signals trans-

mitted by a broadcast station licensed by the Federal Communications Commission, within the local service area of such station, to the private lodgings of guests or residents of such establishment, and no direct charge is made to see or hear the secondary transmission; or

(2) the secondary transmission is made solely for the purpose and under the conditions specified by clause (2) of section 110; or

(3) the secondary transmission is made by a common, contract, or special carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others: *Provided*, That the provisions of this clause extend only to the activities of said carrier with respect to secondary transmissions and do not exempt from liability the activities of others with respect to their own primary or secondary transmission; or

(4) the secondary transmission is not made by a cable system but is made by a governmental body, or other nonprofit organization, without any purpose of direct or indirect commercial advantage and without charge to the recipients of the secondary transmission other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service.

(b) SECONDARY TRANSMISSION OF PRIMARY TRANSMISSION TO CONTROLLED GROUP.—Notwithstanding the provisions of subsections (a) and (c), the secondary transmission to the public of a primary transmission embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506, if the primary transmission is not made for reception by the public at large but is controlled and limited to reception by particular members of the public.

(c) SECONDARY TRANSMISSIONS BY CABLE SYSTEMS.—

(1) Subject to the provisions of clause (2) of this subsection, secondary transmissions to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission and embodying a performance or display of a work shall be subject to compulsory licensing upon compliance with the requirements of subsection (d) in the following cases:

(A) Where the signals comprising the primary transmission are exclusively aural and the secondary transmission is permissible under the rules, regulations or authorizations of the Federal Communications Commission; or

(B) Where the community of the cable system is in whole or in part within the local service area of the primary transmitter; or

(C) Where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations or authorizations of the Federal Communications Commission.

(2) Notwithstanding the provisions of clause (1) of this subsection, the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506, in the following cases:

(A) Where the carriage of the signals comprising the secondary transmission is not permissible under the rules, regulations or authorizations of the Federal Communications Commission; or

(B) Where the cable system, at least one month before the date of the secondary transmission, has not recorded the notice specified by subsection (d).

(d) COMPULSORY LICENSE FOR SECONDARY TRANSMISSIONS BY CABLE SYSTEMS.—

(1) For any secondary transmission to be subject to compulsory licensing under subsection (c), the cable system shall at least one month before the date of the secondary transmission or within 30 days after the enactment of this Act, whichever date is later, record in the Copyright Office, a notice including a statement of the identity and address of the person who owns or oporates the secondary transmission service or has power to exercise primary control over it together with the name and location of the primary transmitter, or primary transmitters and thereafter, from time to time, such further information as the Register of Copyrights shall prescribe by regulation to carry out the purposes of this clause.

(2) A cable system whose secondary transmissions have been subject to compulsory licensing under subsection (c) shall, during the months of January, April, July, and October, deposit with the Register of

Copyrights, in accordance with requirements that the Register shall prescribe by regulation—

(A) A statement of account, covering the three months next preceding, specifying the number of channels on which the cable system made secondary transmissions to its subscribers, the names and locations of all primary transmitters whose transmissions were further transmitted by the cable system, the total number of subscribers to the cable system, and the gross amounts paid to the cable system irrespective of source and separate statements of the gross revenues paid to the cable system for advertising, leased channels, and cable-casting for which a per-program or per-channel charge is made and by subscribers for the basic service of providing secondary transmissions of primary broadcast transmitters; and

(B) A total royalty fee for the period covered by the statement, computed on the basis of specified percentages of the gross receipts from subscribers to the cable service during said period for the basic service of providing secondary transmissions of primary broadcast transmitters, as follows:

(i) ½ percent of any gross receipts up to $40,000;

(ii) 1 percent of any gross receipts totalling more than $40,000 but not more than $80,000;

(iii) 1½ percent of any gross receipts totalling more than $80,000, but not more than $120,000;

(iv) 2 percent of any gross receipts totalling more than $120,000, but not more than $160,000; and

(v) 2½ percent of any gross receipts totalling more than $160,000.

(3) The royalty fees thus deposited shall be distributed in accordance with the following procedures:

(A) During the month of July in each year, every person claiming to be entitled to compulsory license fees for secondary transmissions made during the preceding twelve-month period shall file a claim with the Register of Copyrights, in accordance with requirements that the Register shall prescribe by regulation. Notwithstanding any provisions of the antitrust laws (as designated in section 1 of the Act of October 15, 1914, 38 Stat. 730, Title 15 U.S.C. section 12, and any amendments of such laws), for purposes of this clause any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together

and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

(B) After the first day of August of each year, the Register of Copyrights shall determine whether there exists a controversy concerning the statement of account or the distribution of royalty fees. If he determines that no such controversy exists, he shall, after deducting his reasonable administrative costs under this section, distribute such fees to the copyright owners entitled, or to their designated agents. If he finds the existence of a controversy he shall certify to that fact and proceed to constitute a panel of the Copyright Royalty Tribunal in accordance with section 803. In such cases the reasonable administrative costs of the Register under this section shall be deducted prior to distribution of the royalty fee by the tribunal.

(C) During the pendency of any proceeding under this subsection, the Register of Copyrights or the Copyright Royalty Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

(c) DEFINITIONS.—

As used in this section, the following terms and their variant forms mean the following:

A "primary transmission" is a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service, regardless of where or when the performance or display was first transmitted.

A "secondary transmission" is the further transmitting of a primary transmission simultaneously with the primary transmission or nonsimultaneously with the primary transmission if by a "cable system" not located in whole or in part within the boundary of the forty-eight contiguous States, Hawaii, or Puerto Rico: *Provided, however*, That a nonsimultaneous further transmission by a cable system located in a television market in Hawaii of a primary transmission shall be deemed to be a secondary transmission if such further transmission is necessary to enable the cable system to carry the full complement of signals allowed it under the rules and regulations of the Federal Communications Commission.

A "cable system" is a facility, located in any State, Territory, Trust Territory or Possession that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission and makes secondary transmissions of such signals or programs by wires, cables, or other communications channels to subscribing members of the public who pay for such service. For purposes of determining the royalty fee under subsection (d)(2)(B), two or more cable systems in contiguous communities under common ownership or control or operating from one headend shall be considered as one system.

The "local service area of a primary transmitter" comprises the area in which a television broadcast station is entitled to insist upon its signal being retransmitted by a cable system pursuant to the rules and regulations of the Federal Communications Commission.

Appendix H H1

The Copyright Act of 1909, Amendments Since 1931

§ 1: Amended July 17, 1952, to provide protection to recordation rights in non-dramatic literary works; further amended October 15, 1971, to provide for copyright in sound recordings.

§ 3: Amended October 31, 1951, to correct irregularity in language.

§ 5: Amended July 31, 1939, to include prints or labels; further amended October 15, 1971, to include sound recordings.

§ 6: Added July 31, 1939, to provide for registration of prints and labels.

§ 8: Amended October 31, 1951, to correct date in text; further amended September 7, 1962, and August 12, 1970, to allow U. S. Postal Service to copyright certain works.

§ 9: Amended September 25, 1941 to allow protection to foreign authors via treaties; further amended August 31, 1954, to provide for Universal Copyright Convention.

§ 13: Amended March 29, 1956, to modify deposit requirements.

§ 16: Amended June 3, 1949 to clarify and expand manufacturing clause.

§ 19: Amended July 31, 1939, August 31, 1954, and October 15, 1971, to modify notice requirements.

§ 20: Amended October 15, 1971, to provide for location of notice on sound recording.

§ 22: Amended June 3, 1949, to modify *ad interim* protection of works published abroad.

§ 24: Amended March 15, 1940, to modify renewal requirements for cyclopedic works.

Appendix H H2

§ 25: Added July 31, 1939, to allow renewal of works registered in Patent Office.

§ 26: Amended October 15, 1971, to define "sound recordings."

§ 101: Subsection (f) relating to practice and procedure repealed June 25, 1948; amended October 15, 1971, to define infringement of sound recordings.

§§ 102, 103: Repealed June 25, 1948, as relating to practice and procedure.

§ 109: Amended April 11, 1940, regarding certificate of compliance for importation of prohibited articles.

§§ 110, 111: Amended May 17, 1932, and June 25, 1936, and repealed June 25, 1948, as relating to practice and procedure.

§ 112: Amended October 31, 1951, to specify court with injunctive power.

§ 114: Amended October 31, 1951, to specify courts from which appeal may be taken.

§ 115: Amended September 7, 1957, to modify limitations on civil and criminal actions.

§ 211: Amended April 27, 1948, to modify cost of catalog.

§ 215: Amended April 27, 1948, June 3, 1949, and October 27, 1965, to modify fees.

§ 216: Added April 13, 1954, to modify filing dates.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-452

TWENTIETH CENTURY MUSIC CORPORATION and MARY M. BOURNE, *Petitioners,*

v.

GEORGE AIKEN, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENT GEORGE AIKEN

QUESTION PRESENTED

Whether the owner of a "fast food" shop who connected several speakers to his radio so that broadcasts received on the set were audible to his employees and customers thereby engaged in an infringing "performance for profit" of copyrighted music which was broadcast by a radio station under a license from the copyright owners?

RESTATEMENT OF THE CASE

Since petitioners' "Statement of the Case" does not contain several pertinent facts, a concise restatement is deemed necessary.

George Aiken owns and operates "George Aiken's Chicken," a fast-service food shop in Pittsburgh, Pennsylvania. Approximately 60% of his customers buy food to "take out"; 40% consume the food on the premises. Since there are no waitresses, the latter customers, after buying the food, carry it on disposable paper to a counter or booth where they consume it. The sit-down area is capable of accommodating up to approximately 40 customers. Normally, a "take out" customer spends no more than two to five minutes in the store; in those instances in which the customer eats the food in the store, the total time is between 10 and 15 minutes. (App. 58A.)

Aiken had a radio in the store for a number of years, primarily for the enjoyment of the employees. At first he kept the radio set, without any external speakers, behind the counter. He found, however, that located in that position, it interfered with his employees' conversation with customers. He, therefore, installed two speakers in the ceiling[1] so that the sound would be substantially uniform throughout the public portion of the premises. As Aiken testified, this was done "primarily to take the near effect of the radio blaring in

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[1] Petitioners appear to be in error in their reference to *three* of the five speakers as being located in the public portion (Br. 7). Since the district court found a total of five speakers, and it is undisputed that one of these was in the kitchen, one in the office and one in the washroom, Aiken's testimony (App. 59A) that only two speakers were located in the public portion was obviously accepted by the trial judge. (356 F. Supp. 271, 272 (1973)).

the employees' ears away" (App. 57A-58A). Another speaker was placed in the kitchen, one in the washroom and one in the office (App. 59A). Aiken's practice was to turn on the radio set in his store when the shop was opened at 9:00 a.m. and to keep it tuned to a local broadcast station until the close of business at 6:00 p.m. The radio was on whether or not customers were in the store.[2] No effort was made to alter, delete or add to any part of the broadcasts; news, musical programs, commercial announcements and all other material broadcast by the station were heard in the store exactly as broadcast (App. 58A).

Aiken acknowledged that the availability of the broadcasts contributed to his employees' happiness and that, as a consequence, they worked more efficiently (App. 59A). Customers, while they stood in line waiting to make their purchases as well as while they were eating the food, heard the broadcasts as they came through the speakers (App. 60A). In response to an inquiry whether he was "using the speakers for a profit," Aiken stated: "[I] am not selling music, they are not dancing to it, they are not enjoying themselves through it. The customers aren't there long enough to hear more than one or two songs." *Ibid.*

On March 11, 1972, Aiken's radio was tuned to Station WKJF-FM, Pittsburgh, which, on that day, broadcast, as part of its programming, two musical compositions, "The More I See You" and "Me and My Shadow". The copyright owners of the two compositions, petitioners Twentieth Century Music Corporation and Mary M. Bourne, respectively, were members of the American Society of Composers, Authors and Pub-

[2] There were no customers during approximately 40% of the time the store was open for business (App. 57A).

lishers ("ASCAP")[3] which they authorized to grant licenses to broadcast stations for performance of their works.

An ASCAP representative who was engaged to observe Aiken's operations was in the store on March 11, 1972 when the two musical compositions were broadcast by Station WKJF-FM. He testified that during the approximately one hour and twenty minutes that he spent in Aiken's store, there were a number of customers, including some who sat down and ate the food which they purchased; he estimated that a minimum of six and a maximum of eight customers, in addition to three employees, were present at any one time (App. 20A-21A).

Station WKJF-FM having entered into ASCAP's "local station blanket radio license" broadcast the two musical works as authorized by the copyright owners (App. 20A). The station was obligated under the license to pay ASCAP a commercial fee equivalent to 2% of its "net receipts from sponsors after deduction" (App. 72A). It was also required to pay a sustaining fee based either on a formula involving the station's advertising rate or a flat sum if its net receipts

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[3] ASCAP is an unincorporated association of composers, authors, and publishers of musical compositions and operates a copyright pool which licenses performances of the copyrighted music contained in its repertory. As the result of an antitrust suit brought against ASCAP by the Government many years ago, it is subject to the provisions of the Final Judgment in *United States* v. *American Society of Composers, Authors and Publishers*, 1950 Trade Cases, ¶ 62,595 (S.D.N.Y. 1950). *See also K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967). The United States District Court for the Southern District of New York retains jurisdiction over the Final Judgment to supervise arrangements for licenses of the ASCAP repertory.

from sponsors was less than a stated amount.[4] The license included the provision inserted in all ASCAP radio licenses that: "Nothing herein contained shall be contrued as authorizing LICENSEE to grant to others any right to reproduce or perform publicly for profit by any means, method or process whatsoever, any of the musical compositions licensed hereunder or as authorizing any receiver of any radio broadcast to perform publicly or reproduce the same for profit, by any means, method or process whatsoever." (App. 28A.)

ASCAP has about 5,150 outstanding licenses with commercial establishments which use radio broadcasts. These licensees are permitted under their licenses to use ASCAP music by means of tapes and records as well as from radio broadcasts. (App. 43A.)[5] The fees derived by ASCAP from these licenses is $246,000 annually (App. 30A). ASCAP's General Counsel testified that ASCAP did not seek to require licenses from commercial establishments which use radio broadcasts of ASCAP music on an ordinary home receiving set without external speakers (App. 38A, 44A).

On June 2, 1972, a suit was brought against Aiken by the copyright owners of "The More I See You" and "Me and My Shadow" in which they alleged that on March 11, 1972 Aiken had publicly performed their compositions for profit in his fast-food shop and had,

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[4] Since WKJF-FM's "net receipts from sponsors" was estimated to be $129,000 for the first year, it was obligated to pay a sustaining fee of "21.6 times the highest one-minute card rate of the station for a single minute," subject to adjustments in succeeding years for changes in the amount of net receipts from sponsors (App. 72A).

[5] The record does not indicate whether or not if these establishments also used live entertainment they would be covered for ASCAP compositions by the same ASCAP license.

thereby, infringed their copyrights. The district court concluded that *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931), was controlling and that Aiken, therefore, was an infringer. Accordingly, a judgment in the sum of $250.00 was entered for each plaintiff. (356 F. Supp. 271 (W.D. Pa. 1973)).

This judgment was reversed by the U.S. Court of Appeals for the Third Circuit which held that in light of the views of this Court expressed in *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968), and *Teleprompter Corp.* v. *Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974) concerning the appropriate standard to be applied in determining whether there is a "performance" for copyright purposes, Aiken's actions in merely extending the range of audibility of the broadcast program could not be deemed to have infringed copyrights. (500 F. 2d 127 (1974)). The case is before this Court on certiorari.

SUMMARY OF ARGUMENT

I.

The Court of Appeals, applying this Court's construction of the term "performance" as used in the Copyright Act, correctly decided that Aiken was not engaged in an infringing "performance" of the copyrighted musical compositions. To have held that Aiken was engaged in a performance of the musical compositions which were received from the broadcasting station would have run counter to the decisions establishing that operators of cable television systems and their subscribers (which include commercial establishments) are on the audience side of the line rather than on the performing side occupied by broadcasting stations.

In view of the "function" standard for performance prescribed in the *Fortnightly* and *Teleprompter* decisions of this Court, Aiken cannot be deemed to be an infringer of the copyrights in programs aired by the broadcasting station. His business was the selling of food to customers; his functions were completely unrelated to programming. He received the broadcast material (including music, news and commercials) simultaneously and without deletion exactly as they were sent over the air by the station. The copyright owners of the musical compositions which were broadcast had authorized the station to broadcast them. Their royalties—based on the revenues which the station derived from advertisers—were dependent on the total audience (whether at home, in stores, in vehicles or at offices) which the station could reach.

II.

Exacting a copyright license from Aiken would defeat the objectives of both the Copyright Act and the Communications Act. The broadcasts in this case were heard by members of the public, all of whom were within the normal reach of the broadcasting station. Imposing a license requirement on the ground that Aiken has engaged in a "performance for profit" may cause lunch counters, hairdressers, dentists' offices and a myriad of similar business and professional establishments throughout the country to keep their sets turned off, thereby depriving members of the public of access to radio broadcasts for a large segment of the day. Such a result would be inconsistent with the aim of the Communications Act to secure the widest possible benefit of radio to all potential listeners.

III.

Petitioners' assertion that *Jewell-LaSalle* is controlling is without merit. This Court has squarely rejected as unsound the test of "performance" used in that case and, while not explicitly overruling the decision, has limited it to its own facts. Those facts are readily distinguishable from the facts in the instant case, the principal distinction being that the copyright owners involved in *Jewell-LaSalle,* unlike petitioners, had not authorized the broadcast of their music.

IV.

Petitioners have fallaciously contended that congressional failure to enact various kinds of proposed legislation can be construed as a manifestation of an intent by Congress that the teaching of *Jewell-LaSalle* should be applied to the case at bar. No such intention can logically be inferred from congressional silence. In any event, whatever may be the nature and effect of future legislation in the copyright field, Aiken cannot be deemed an infringer under the statute now in effect.

V.

Petitioners' contention that the viability of *Jewell-LaSalle* should not be impaired because copyright owners derive compensation from extensive business relationships that have developed in reliance on that decision is also without merit. Not only is the income derived from these relationships relatively insubstantial, but petitioners have failed to demonstrate that their revenue will be diminished appreciably, if at all, by an affirmance of the decision below. Finally, their contention that *Flood* v. *Kuhn* is a precedent for

adherence by this Court to the erroneous standard of *Jewell-LaSalle* is untenable; the situation presented in *Flood* v. *Kuhn* was unique and clearly distinguishable.

ARGUMENT

I. Aiken Merely Aided in the Reception of Programs Broadcast by a Radio Station Which Was Licensed by the Copyright Owners to Perform These Programs; Therefore, He Did Not Engage in a "Performance for Profit" of the Copyrighted Material.

In *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968), this Court, upholding the rights of Community Antenna Television (CATV) systems to receive and rechannel television programs to their subscribers without incurring copyright liability to the program suppliers, stated that:

> "Broadcasters perform. Viewers do not perform. Thus, while both broadcaster and viewer play crucial roles in the total television process, a line is drawn between them. One is treated as active performer; the other, as passive beneficiary."[6]

The activities of the CATV operator were held to fall on the viewer's side of the line.

In *Teleprompter Corp.* v. *Columbia Broadcasting Systems, Inc.*, 415 U.S. 394 (1974), in which the same standard was applied, the Court re-emphasized the language of *Fortnightly* that:

> "The function of CATV systems has little in common with the function of broadcasters. CATV systems do not in fact broadcast or rebroadcast. Broadcasters select the programs to be viewed; CATV systems simply carry, without editing,

[6] 392 U.S. at 398-99 (footnotes omitted).

whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers. We hold that CATV operators, like viewers and unlike broadcasters, do not perform the programs that they receive and carry."[7]

The copyright significance of the function involved in CATV operations did not turn on whether the subscriber received the broadcasts in his home or in his place of business. Among the subscribers to CATV services are many business establishments.[8] It is logically inconsistent for petitioners to claim that Aiken's store is on the performing side when this Court has held that CATV systems and their subscribers are on the audience side. In aiding his employees and customers to hear the broadcasts more comfortably, Aiken was functioning conceptually even closer to the audience than the CATV systems in *Fortnightly* and *Teleprompter*. The decision below correctly found no determinative differences on the question of "performance" between the CATV cases and the case at bar.[9]

Aiken's business is to sell food which customers could either "take out" or consume on the premises. As he described it, this was "primarily a delicatessen operation" (App. 57A). He was not in the business of

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[7] 392 U.S. at 400-401, as quoted in *Teleprompter*, 415 U.S. at 403.

[8] The Court in *Fortnightly*, referring to the rates charged by CATV systems, noted that: "Increased charges were levied . . . for commercial establishments." 392 U.S. at 393, n.7.

[9] No distinction can be made in this context between television and radio programs; many CATV operators supply radio and television signals, *cf.* Radio Signals, Importation by Cable Television, 36 F.C.C. 2d 630 (1972).

selling entertainment.[10] Other than turning on his radio set to receive in its entirety, without editing, whatever was broadcast, Aiken had nothing to do with the performance.

ASCAP acknowledged that it would not have treated Aiken as an infringer if he had continued using an ordinary radio receiving set behind his counter. But using his radio in this way created a "blaring" effect which interfered with the employees' conversations with customers and he, therefore, sought to improve the reception by installing several speakers in the ceiling. This enabled the broadcasts to be heard uniformly throughout the premises. ASCAP's charge that he became an infringing performer by installing speakers in the ceiling is, we submit, bottomed on the unsound and rejected mechanistic standard of *Jewell-LaSalle*.

Construing the term "performance" in the Copyright Act in its "ordinary sense" and in line with "common understanding",[11] it would put an unbearable strain on realism to treat Aiken as having engaged in an infringing "performance." At no time did he attempt to delete, add to, or in any way alter the broadcasts as they came over the air. There is no evidence even of any equipment on his premises by which Aiken could have made any deletions or alterations of commercial announcements or other matter that

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[10] Even though operators of CATV systems receive their income for rechanneling copyrighted material to subscribers, they are not in a performing role from a copyright standpoint. *A fortiori*, Aiken, whose income is realized solely from sales of food, cannot be deemed to have assumed the role of a performer of copyrighted material.

[11] *Cf.* White-Smith Music Pub. Co. v. Apollo Co., 209 U.S. 1 (1908).

was broadcast. In short, the music, news, other programming, and commercial announcements broadcast by Station WKJF-FM were audible in Aiken's store exactly as they were sent over the air by that station for the purpose of being available to all members of the public within reach of its signal. The selection of the programming and of the commercial announcements was solely and entirely within the station's control; Aiken had nothing to do with the selection process except to turn the dial to the frequency on which the particular station was broadcasting; if the broadcast did not suit him, he had the choice of either turning the dial to another station or turning the radio off entirely.

Aiken and others in his store heard whatever came over the air simultaneously with its broadcast by the station; there was no attempt to tape or record the broadcasts for listening at a different time. Nothing which Aiken did extended the broadcasts of Station WKJF-FM to any audience beyond the normal reach of the station.[12] The employees and customers in Aiken's store were among those who were intended to be reached by the station. Commonly, broadcasters, in attempting to sell advertising to be carried on their stations, stress that their commercial messages are audible wherever the listener happens to be—whether at home, in a car, in a store, or at an office. The copyright

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[12] Although Mr. Justice Fortas dissented in *Fortnightly* because the teaching of *Jewell-LaSalle* as to the meaning of the term "perform" in the Copyright Act was being abandoned, even he apparently interpreted *Jewell-LaSalle* as being applicable only to a situation involving "the use of mechanical equipment to extend a broadcast to a significantly wider public than the broadcast would otherwise enjoy. . . ." 392 U.S. at 406.

holders are the beneficiaries of these attempts to maximize the audience since their royalties—based, as they are, on the revenues of the station—reflect the number of listeners who are attracted to the station and who can, therefore, be claimed as part of the audience for advertising messages. As we demonstrate hereinafter under Point III, exacting direct license fees from small businesses such as Aiken's on top of the royalties paid by the broadcasting stations is unfair and unnecessary, as well as inconsistent with the objectives of both the Copyright Act and the Communications Act.

The Court of Appeals assumed that if Aiken was found to have engaged in a "performance", the other requisites for infringement, namely, that the performance be a "public" one, and "for profit",[13] were satisfied.[14] This Court, of course, is not precluded from affirming the decision on the additional ground that the "for profit" element was lacking.[15] It is doubtful that any part of the sale price of Aiken's delicatessen can reasonably by treated as compensation for the opportunity afforded the customer to listen to a radio while standing in line to make his purchase, or during the relatively short time spent in consuming the food. Further, Aiken's purpose is sufficiently different from that of the hotel owner in *Herbert* v. *Shanley Co.*, 242 U.S. 591 (1917), who supplied an orchestra and singers for

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[13] 17 U.S.C. § 1(e) (1970).

[14] The Court of Appeals stated that "[n]either the plaintiffs nor the defendant argue with any conviction that the 'tuning in' of the radio by the defendant . . . constituted a private as distinct from a public 'performance'. Nor do they contend seriously that if such be the case that the 'performance' was not for profit." 500 F.2d at 130, n.7.

[15] *See* Helvering v. Gowran, 302 U.S. 238, 245 (1937).

the entertainment of persons who dined in the hotel restaurant as to warrant different treatment on this point.

While arguably everything that Aiken made available to his customers—including the paper on which the food was carried to the table, the various appurtenances in the store, as well as the opportunity to hear the radio broadcasts—were part of the "package" for which Aiken was paid, we think it more reasonable to consider them as such incidental parts of the transaction that they should not be held to be part of the consideration for the payments made by the customers. There was no evidence that any customers were induced even in the slightest degree to trade at Aiken's because of the music. And while the broadcasts were admittedly pleasant for his three employees to hear as they worked behind the counter or in the kitchen and, thus, hopefully enhanced their efficiency, this is a far cry from a system of providing radio and phonographic music for workers of the kind which was instituted by the factory owner involved in *Ernest Turner Electrical Instruments, Ltd.* v. *Performing Right Society,* 168 L. T. R. 285 (Ct. of App. 1943), cited by petitioners (Br. 20). Accordingly, it is submitted that the decision below can be affirmed on the ground that Aiken's activities in respect of the musical compositions were not "for profit" within the meaning of the Copyright Act.

Petitioners mistakenly rely (Br. 19-20) upon foreign precedents as support for their assertion that Aiken's conduct constituted a "performance". An examination of the cases cited by petitioners discloses that the foreign courts reached their conclusions upon

analyses of factual settings in terms of the "quantitative" standard articulated in *Jewell-LaSalle,* not in terms of the *function* served by the alleged infringer. Thus, whatever persuasiveness the cited foreign cases might have had prior to the *Fortnightly* decision has ceased to exist.[16]

II. Jewell-LaSalle Does Not Control the Present Case.

A. THE TEST OF AN INFRINGING "PERFORMANCE" APPLIED IN JEWELL-LaSALLE IS NO LONGER SOUND.

Petitioners' contention (Br. 13-18) that *Buck* v. *Jewell-LaSalle Realty Co.,* 283 U.S. 191 (1931), is controlling and that, consequently, Aiken must be deemed an infringer is untenable on several grounds.

In *Fortnightly,* the first case decided by this Court after *Jewell-LaSalle* in which the opportunity was presented to re-evaluate the standard of "performance" articulated in that decision, it was rejected. The Court quoted with approval [17] the statement from *Buck* v. *Debaum,* 40 F.2d 734, 735 (S.D. Cal. 1929),[18] that:

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[16] Petitioners' further effort (Br. 33) to rationalize, by reference to the British copyright scheme, their attempt to achieve disparate treatment as between CATV operations and radio reception of copyrighted music is unpersuasive. While cable television operators are not defined as performers under the British Copyright Act of 1956, § 48(5), they are, nonetheless, subject to copyright liability as transmitters of broadcast programs, §§ 5(c) and 48(3). The express copyright liability to which British CATV operators are subject distinguishes the British scheme from American copyright law and negates petitioners' inference of approbation for different treatment of radio reception of copyrighted music from that accorded CATV operations.

[17] 392 U.S. at 398, n.24.

[18] The *Debaum* court held in favor of a cafe owner who was charged with having "performed" an ASCAP musical composition by tuning a radio to a broadcast from a licensed radio station for the benefit of his patrons.

> "One who manually or by human agency merely actuates electrical instrumentalities, whereby inaudible elements that are omnipresent in the air are made audible to persons who are within hearing, does not 'perform' within the meaning of the Copyright Law."

Fortnightly decided that the appropriate test requires an evaluation to determine whether the acts of the alleged infringer aid in the broadcasting of the copyrighted work or aid in the viewing (or listening) of the performance.

In enunciating this more realistic "function" test, the Court left no doubt that *Jewell-LaSalle* is no longer controlling on this point. As it subsequently stated in *Teleprompter*:[19]

> "In the *Fortnightly* case the Court of Appeals had concluded that a determination of whether an electronic function constituted a copyright 'performance' should depend on 'how much did the [CATV system] do to bring about the viewing and hearing of a copyrighted work.' 377 F.2d 872, 877. This quantitative approach was squarely rejected by this Court:
>
> > '[M]ere quantitative contribution cannot be the proper test to determine copyright liability in the context of television broadcasting. . . . Rather, resolution of the issue before us depends upon a determination of the function that CATV plays in the total process of television broadcasting and reception.' 392 U.S., at 397."

The Court has thus explicitly discarded the rationale of *Jewell-LaSalle*. It refused to extend what it termed

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[19] 415 U.S. at 407-08.

"a questionable 35-year-old decision" which it said "must be understood as limited to its own facts." 392 U.S. at 397, n. 18 and 401, n. 30.[20] In insisting, notwithstanding this recent history, that *Jewell-LaSalle* should control the disposition of the present case, petitioners are attempting to circumvent the logic of *Fortnightly* and *Teleprompter,* and urge that the latter cases, instead of *Jewell-LaSalle,* be limited to their own facts. Apart from exceptions for CATV systems, petitioners maintain that *Jewell-LaSalle* remains effective and requires that Aiken's use of speakers be defined as a "performance." This effort to limit *Fortnightly* and *Teleprompter* cannot be justified.

In *Teleprompter,* the "function" standard was reaffirmed despite arguments by copyright owners that the CATV systems[21] provided services far in excess of *Fortnightly.* Teleprompter interconnected with other CATV systems and by means of microwave imported distant signals that otherwise would not be available in the community. It also originated its own programming and sold commercial time. Notwithstanding these factual differences from the *Fortnightly* situation, the Court determined that in the interception of broadcast signals which were rechanneled to viewers, CATV systems were still functioning on the audience side of the line, not the side of the broadcasters, and thus were *not* infringing the copyrights in the programs embodied in the broadcasts.

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[20] The *Jewell-LaSalle* rationale is also analytically defective because, as pointed out by a noted copyright authority, it is based on a faulty analogy to the "playing of a phonograph record," with respect to which there is a separate copyright provision. M. NIMMER, ON COPYRIGHT § 107.41 (1974).

[21] In *Teleprompter,* as in *Fortnightly,* the CATV systems provided service to hotels, motels, restaurants, bars, and other business establishments, as well as to private homes.

B. JEWELL-LaSALLE IS FACTUALLY DISTINGUISHABLE

This Court has not said in so many words that *Jewell-LaSalle* is overruled but it could not have been clearer in declaring that the premise underlying the decision is fallacious. The Court of Appeals was of the opinion that the 1931 decision was no longer viable. 500 F.2d at 136, n. 21. But whether or not *Jewell-LaSalle* was technically overruled, it has been explicitly limited to its own factual setting. The facts to which it has been confined differ in a very significant respect from the facts presented in the instant case.

The principal distinction [22] lies in the fact that the 1931 case involved the rarity of a radio station broadcasting music without the benefit of a license by copyright owners,[23] whereas Station WKJF-FM was duly authorized by the copyright owners to broadcast the musical compositions which were picked up by Aiken

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[22] Aiken's installation of five speakers in his establishment differs markedly from the LaSalle Hotel's use of a large and powerful master receiving set and connecting wires by which music was "piped" to speakers and headphones in 200 guest rooms, as well as the public areas in the hotel. Moreover, from an economic standpoint, the hotel owner's objectives in providing hundreds of guests not only with sleeping accommodations but also with what was presumably considered a significant source of entertainment and recreation differ in substantial measure from Aiken's simple objective of alleviating the tedium of his three employees thereby promoting their efficiency (App. 59A).

[23] A commentator has characterized the Jewell-LaSalle station as presenting "one of those rarities—a station not licensed by the copyright owners." Sprague, 3 AIR LAW REVIEW 417 (1932). It is doubtful that more than a few, if any, currently operating commercial radio stations broadcast copyrighted music without licenses from ASCAP and one or more of the other performing rights societies. But if such a rarity does exist, it need not concern us in this case for Station WKJF-FM was indisputably licensed by ASCAP to broadcast the two musical compositions.

on his radio set. Although petitioners seek (Br. 14-16) to deprecate this distinction, they cannot ignore the fact that the Court in *Jewell-LaSalle* expressly stated: "We have no occasion to determine . . . the effect upon others of [the broadcaster] paying a license fee,"[24] and pointed out that:

> "If the copyrighted composition had been broadcast by Duncan [the operator of the station] with plaintiffs' consent, a license for its commercial reception and distribution by the hotel company might possibly have been implied. Compare Buck v. Debaum (D. C.) 40 F. (2d) 734."[25]

In the *Debaum* case to which reference was made, the importance of the copyright owners' authorization of the station's broadcasts was emphasized. The court stated that they thereby must be held to have acquiesced in the use of the broadcasts by the cafe owner. For, as the court observed:

> "It is common knowledge, of which the court should take judicial notice, that programs from commercial radio broadcasting stations are interspersed with lectures, instrumental and vocal musical compositions, sermons, speeches, etc., many of which are not protected by the copyright laws of the United States, and many of which can be unconditionally and freely performed by the broadcasting station, and, if during the reception of such programs, one using the radio in his business is required to turn the dial of his receiving set so as to render inaudible any copyrighted composition, the utmost difficulty and confusion will result, and a condition ensue that to my mind is unreasonable, and one that was never within the intent of Congress in passing the Copyright Act

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[24] 283 U.S. at 198.

[25] *Id.* at 199, n. 5.

or within the reasonable purview of the terms thereof." [26]

ASCAP, on behalf of the copyright owners, negotiated a royalty arrangement with Station WKJF-FM, Pittsburgh, under which broadcasts of music from the ASCAP repertory, including the two compositions involved here, could be released by the station for reception by the public and, thus, exhausted the monopoly in the copyrights so far as simultaneous reception of the broadcasts was concerned. Consequently, the public—whether in their homes, in Aiken's store, in their doctors' offices, or anywhere else within reach of the station—had a license implied in law to receive that broadcast.

III. The Imposition of Copyright Liability on Aiken Would Defeat the Objectives of Both the Copyright Act and the Communications Act.

Petitioners concede (Br. 8-9) that Aiken would not have been required to obtain an ASCAP license if he had continued to use a home-type radio receiver with no external speakers. The attempted distinction among commercial establishments on the basis of whether or not external speakers are used is arbitrary.[27]

The free use of receiving sets should not be dependent upon the grace or forbearance of performing rights organizations or other copyright owners. The Copy-

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[26] 40 F.2d at 736.

[27] Presumably ASCAP would not insist upon exacting a license from Aiken for radio broadcasts in his home even if his receiving "set" was not assembled in one piece but, for better reception for himself and his guests, included several separate speakers.

right Office, in a report which was the culmination of extensive studies of the copyright laws, has pointed out that:

> "Although the *Jewell-LaSalle* case involved a retransmission, the effect of this decision may be that any business establishment that operates a radio or television receiving set for the entertainment of its patrons—including hotels, restaurants, taverns, barber shops, etc.—could be required to procure performing licenses for all copyrighted works in the broadcasts it receives.
>
> "As a practical matter this problem has been confined so far to broadcasts of music, though it could conceivably arise also as to broadcasts of dramatic and literary works and even of motion pictures. We understand that the two principal organizations controlling the performing rights in music (ASCAP and BMI) have generally followed the policy of confining their demands for license fees to those establishments, such as the hotel in the *Jewell-LaSalle* case, that retransmit broadcasts to their various rooms. Other similar organizations, however, may not have the same policy. And there have been complaints from some small establishments that they were asked to obtain performing licenses for the mere operation of receiving sets. In any event, the free use of receiving sets should not be left to the grace or forbearance of the performing rights organizations or other copyright owners.
>
> * * *
>
> "We believe [the] principle of clearance at the source should apply to the reception of broadcasts. The performing license obtained by the broadcaster should suffice, with no further license required of those who merely receive the broadcast. We would, however, require the receiver to obtain a performing license if he makes a charge to the

public for the reception of the broadcast– for example, by charging an admission fee, or by requiring a payment for operation of the receiving set."[28]

The primary policy of the Copyright Act is to make available to the public the benefit of an author's or composer's work; while reward to the copyright owner is also an important consideration, it is secondary and must be justified by its contribution to the primary objective.[29] Having released for broadcast the musical compositions for which Station WKJF-FM undertook to pay royalties, the copyright owners must be held to have intended that all members of the public could enjoy the rendition of the compositions as they came over the air without paying a second royalty. The royalties charged the broadcasting station were geared to its revenues and since commercial radio is an advertiser-supported medium, the revenues are affected by the number of listeners reached by the station, wherever they may be. The usual formula, expressed in terms of "cost per thousand", ultimately determines the station's revenues from advertisers. Having shared indirectly, as consumers of advertised products and services, in the burden of the royalty fees paid by the station to ASCAP,[30] Aiken's customers should not be re-

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[28] REGISTER OF COPYRIGHTS, REPORT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 30-31, 87th Cong., 1st Sess. (House Judiciary Comm. Print, 1961).

[29] *See* Mazer v. Stein, 347 U.S. 201, 219 (1954); United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).

[30] While the point may be argued by economists, conventional wisdom would seem to suggest that to some extent at least, these advertising costs are passed on to purchasers of the advertised products and services.

quired to make additional payments for the broadcasts. This would be the case if Aiken, forced to pay license fees, passed on this additional charge to his customers in the form of higher prices.

Furthermore, if Aiken should be held to be engaging in a "performance for profit", acceding to ASCAP's demands would, at best, afford him only partial protection against infringement claims. Having no control over, or advance notice of, what any station might broadcast, he obviously might tune in a station at a time when it was performing a copyrighted work not in the ASCAP repertory.[31] Short of obtaining licenses from representatives of every copyright owner whose works might be on the air at any time and over every station which could be heard over his set, his best protection would be in keeping the set turned off. Thus, the consequence of upholding ASCAP's position may well be that lunch counters, barber shops, dentist's offices, hospitals and a myriad of other establishments throughout the country would choose to keep their sets turned off, thereby depriving a large part of the public of access to radio broadcasts unless they carry their own portable radios.

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[31] In the *Fortnightly* case, BMI stated that it "is a music performing rights licensing organization which licenses the right publicly to perform for profit the music of more than 14,000 writers and more than 8,000 publishers of music. . . . The royalties collected by BMI, after deduction of expenses and reasonable reserves, are distributed to its affiliated writers and publishers. By far the largest part of those royalties are paid by broadcasters who have licenses to broadcast over their facilities any or all of the works in the BMI repertory at a royalty based on the station's gross receipts from advertising." Brief of Broadcast Music, Inc. as Amicus Curiae at 1 (footnotes omitted).

Copyright owners, having the means of obtaining adequate royalties by licensing broadcast stations—*i.e.*, clearance at the source, in which the royalties reflect the size of the listening audience and consequent revenues of the stations from advertisers—should not be awarded double payments. Their present effort to exact additional license fees is inconsistent with congressional objectives as expressed in the Communications Act, the "avowed aim" of which, as this Court has pointed out, is "to secure the maximum benefit of radio to all the people of the United States." [32]

Petitioners claim that the provision which ASCAP devised after *Debaum* and *Jewell-LaSalle* for inclusion in licenses to broadcast stations has negated any implied right of commercial establishments to receive broadcast music (Br. 15-16). A parallel argument was rejected in *Fortnightly* and *Teleprompter* where the same license provision was involved.[33] The short answer to petitioners' contention is that ASCAP simply cannot expect to obtain royalties by authorizing stations to broadcast music from its repertory—broadcasting being defined as "the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations" [34]—and then expect to receive additional remuneration from members of the public who are entitled to hear the broadcasts.

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[32] National Broadcasting Co. v. United States, 319 U.S. 190, 217 (1943).

[33] The only difference—clearly immaterial—is that the licenses in the CATV cases, since they were entered into with television stations, refer to "television" broadcasts whereas here "radio" broadcasts are involved.

[34] The Communications Act of 1934, 47 U.S.C. § 153(o) (1970).

IV. Congress Has Not Manifested Such Support of Jewell-LaSalle As Would Warrant Its Extension to the Facts in This Case.

Petitioners maintain (Br. 34) that "*Jewell-LaSalle* has become an integral part of our copyright law, with the full concurrence of the Congress." They rely on congressional failure to enact proposed legislation which would reject or modify *Jewell-LaSalle* and, seemingly, they also rely on congressional failure to enact proposed legislation which "sought to codify *Jewell-LaSalle,* rather than circumscribe it" (Br. 31). This legislative history of unenacted legislation is unconvincing to establish congressional intent.

Neither party's position is advanced by legislative history. For, as this Court has observed: "It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." [35] We have been admonished that "we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle." [36] The congressional silence in which petitioners ostensibly find comfort is at best a flimsy basis upon which to decide the case at bar.[37]

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[35] Girouard v. United States, 328 U.S. 61, 69 (1946).

[36] Helvering v. Hallock, 309 U.S. 106, 121 (1940); *accord* Boy's Markets, Inc. v. Retail Clerk's Union, Local 770, 398 U.S. 235 (1970); United States v. South-Eastern Underwriters Ass'n., 322 U.S. 533 (1944).

[37] The three cases relied upon by petitioners (Br. 29) are readily distinguishable. In Canada Packers, Ltd. v. Atchison, T. & S. F. Ry., 385 U.S. 182 (1966), the Court, in refusing to upset a prior ruling which sanctioned ICC jurisdiction in proceedings to determine reasonableness of international freight rates, was influenced by deference to longstanding administrative policies of an independent regulatory agency and numerous prior judicial decisions reaffirming the challenged construction. The failure of Congress to express a contrary interpretation of the statute was just one of many consid-

Petitioners lay stress on the language contained in S. 1361, adopted by the Senate on September 9, 1974, that "communication embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes [is *not* an infringement of the copyrights of broadcast music], unless: (A) a direct charge is made to see or hear the transmission; or (B) the transmission thus received is further transmitted to the public" (Br. 32). From this language, as well as an essentially identical formulation contained in a bill which passed the House of Representatives in 1967,[38] petitioners make a broad leap to an unwarranted conclusion that Congress has thereby manifested a judgment that reception of broadcasts in public places *is* a performance "both analytically and from the view of legislative policy" (Br. 33). Even if this questionable assertion were valid and, further, assuming enactment of the legislation, Aiken would not be an infringer on the facts of this case. No direct charge was imposed upon customers for listening to the radio in his store; and the broadcasts can hardly be said to have been "further transmitted to the public" by Aiken when all he did was to install two speakers in a relatively small room where food was purchased and consumed.

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erations. In Joint Industry Board v. United States, 391 U.S. 224 (1968), Congress had completely reenacted the pertinent section of the Bankruptcy Act, leaving unchanged the construction of that provision by this Court in an earlier case. In Walling v. Halliburton Co., 331 U.S. 17 (1947), even though the Court noted the unwillingness or inability of Congress to modify the relevant statutory section which had been construed in an earlier case, it relied on *stare decisis* primarily because a number of its own decisions subsequent to the challenged ruling had approved of the decision in question, and it had been followed in numerous lower court cases.

[38] H.R. 2512, 90th Cong., 1st Sess. (1967).

To the extent, if any, that the congressional action-inaction theory relied upon by petitioners has any significance whatever, it suggests perhaps that Congress may be tending to favor the position recommended by the Copyright Office, *supra*, page 21.[39] But, whatever may be the nature and effect of any future legislation which may be adopted by Congress to revise the Copyright Act, Aiken cannot be deemed an infringer under the statute now in effect.

V. There Has Been No Such Reliance Upon Jewell-LaSalle as to Warrant Its Extension to an Aiken-Type Operation.

A. THE BUSINESS RELATIONSHIPS WHICH ARE CLAIMED TO BE DEPENDENT ON JEWELL-LaSALLE DO NOT COMPEL ADHERENCE TO THAT QUESTIONABLE DECISION.

Petitioners argue that a failure by this Court to adhere to *Jewell-LaSalle* will result in the disruption of significant business relationships, jeopardize the income of creative composers and inflict grievous injury upon an important cultural institution (Br. 27-28, 34-35). Granted that some licensing arrangements have been entered into by copyright owners by invoking the authority of *Jewell-LaSalle*, it does not necessarily follow that unless that decision is held dispositive in the instant case, consequences of the kind suggested by petitioners' rhetoric will ensue.

The District Court found that ASCAP has contractual relationships with 5,150 business firms resulting

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[39] See SEN. JUDICIARY COMM., COPYRIGHT LAW REVISION, S. Rep. No. 983, 93rd Cong., 2d Sess. 130 (1974).

in royalty payments of $246,000 annually.[40] These revenues represent 0.3% of ASCAP's total royalties of $70,000,000 annually (App. 49A). The record is barren of any evidence upon which to base an inference that any of the 5,150 licenses will be cancelled if Aiken is held not to have engaged in an infringing performance. To the contrary, since all 5,150 licensees are authorized by ASCAP to use not only radio broadcasts of ASCAP compositions but also tapes and recorded music (App. 43A), a large number might well continue their ASCAP relationship notwithstanding that licenses are not required merely to receive radio broadcasts. In any event, even on the unlikely assumption that all 5,150 licensees would discontinue their payments of license fees to ASCAP if the decision below were upheld, that can hardly be considered a reliance interest of sufficient magnitude or importance to warrant continued adherence to *Jewell-LaSalle* in disregard of the fallacious premise on which it was based.

Petitioners also intimate that an affirmance of the decision below will in some way affect the fees of $2,100,000 which are now collected by ASCAP from Muzak affiliates and other licensees which supply "background" music to subscribers (Br. 2, 10 and 27). Regardless of the viability *vel non* of *Jewell-LaSalle,* each of the Muzak affiliates, being a *supplier* of background music, will continue to be engaged in a "performance for profit" and thus will continue to obtain licenses from, and pay royalties to, ASCAP and other performing rights organizations.[41] The District Court stated

[40] 356 F. Supp. at 273.

[41] ASCAP's General Counsel testified that when commercial establishments using radio "operate the beep [to delete commercials] ASCAP [requires] licenses [from] the supplier of the music, that is like Muzak" (App. 43A).

that a decision adverse to petitioners "might have an effect on a pending request for reduction of licensing fees which has been filed by Muzak affiliates in the Southern District of New York," [42] but petitioners have failed either to concede any such effect or to demonstrate what diminution, if any, there will be in the license fees which they now realize from Muzak affiliates.

In sum, petitioners have failed to show such a substantial reliance interest upon *Jewell-LaSalle* that this Court should be estopped from limiting that decision to its own factual setting. It is common knowledge that in a vast number of business establishments, commercial vehicles and professional offices, radio sets, with or without additional speakers, are turned on daily to receive radio broadcasts.[43] If Aiken and others similarly situated are able to play their radios in their stores without fear of copyright penalties, the size of radio audiences during business hours will be maintained. In turn, the advertising revenues of the broadcasting stations will be preserved.[44] And since ASCAP

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[42] 356 F. Supp. at 273 (1973). This statement of the District Court was adopted in the amicus brief filed by Muzak Corporation in the Court of Appeals, 500 F. 2d 127, 129. The ASCAP consent decree (*supra*, p. 4, n. 3) which governs relationships with licensees limits the license period to a maximum of five years; various legal, economic and technological developments may be reflected in new license agreements to assure that they are reasonable and non-discriminatory.

[43] It may be noted parenthetically that there are 7,807 radio stations operating in this country—4,434 AM; 2,648 FM; and 725 FM educational—as of January 31, 1975. FCC Press Release No. 46399 (February 12, 1975).

[44] Ratings of stations, which are widely relied upon by advertising agencies in placing radio advertising for their clients, reflect

royalties from broadcasting stations are based upon the stations' advertising revenues, it may well be that the loss of any part of the $246,000 which it presently receives directly from commercial establishments will be offset by additional royalties from the stations.

In *Teleprompter,* the Court, when faced with an argument similar to that pressed here by petitioners, stated:

> "By extending the range of viewability of a broadcast program, CATV systems thus do not interfere in any traditional sense with the copyright holders' means of extracting recompense for their creativity or labor. When a broadcaster transmits a program under license from the copyright holder . . . he gets paid by advertisers on the basis of all viewers who watch the program. The use of CATV does not significantly alter this situation. . . . From the point of view of the copyright holders, such market changes will mean that the compensation a broadcaster will be willing to pay for the use of copyrighted material will be calculated on the basis of the size of the direct broadcast market augmented by the size of the CATV market." [45]

B. FLOOD v. KUHN DOES NOT REQUIRE ADHERENCE TO THE ERRONEOUS STANDARD OF JEWELL-LaSALLE.

Flood v. *Kuhn,* 407 U.S. 258 (1972), is urged by petitioners as a precedent for *stare decisis* in the instant case. That decision is, however, readily distinguishable.

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the results of surveys of the listening habits of a representative sample of people within the reach of the station. In the influential ARB surveys, listeners are instructed to carry the Arbitron diary with them wherever they may be during the period of the survey and to indicate therein the name of the station to which they are listening *wherever* they happen to be. ARB (American Research Bureau), Inc., Beltsville, Md., An Arbitron Radio Diary (1974).

[45] 415 U.S. at 412-13.

n *Flood* v. *Kuhn,* the Court held that the exemption of rofessional baseball from the antitrust laws as a re-ult of its decision in *Federal Baseball Club* v. *Na-ional League,* 259 U.S. 200(1922), has become such an stablished "aberration" (to use the Court's term) hat:

> "We continue to be loath, 50 years after *Federal Baseball* and almost two decades after *Toolson,* to overturn those cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, *has clearly evinced* a desire not to disapprove them legislatively." [46]

Thus, as applied in *Flood* v. *Kuhn, stare decisis* was redicated on a unique and longstanding statutory in-erpretation which had been applied by this Court on wo previous occasions; there was a reliance upon those ecisions by a significant segment of the public; and here was a clearly evinced desire by Congress *not* to isapprove of those decisions legislatively. Contrast-ngly, the rationale of *Jewell-LaSalle* was squarely re-ected by this Court; such reliance interests as are in-olved are relatively insubstantial; and there is no learly evinced desire by Congress to disapprove of he manner in which this Court has treated *Jewell-a Salle* in the *Fortnightly* and *Teleprompter* cases.

No legal or equitable considerations have been ad-anced by petitioners which would necessitate a depar-ure by this Court from its current sound statutory onstruction of the term "performance" in the Copy-ight Act. Retrogression to the *Jewell-LaSalle* doctrine vould serve no useful purpose. The Court of Appeals,

[46] 407 U.S. 258, 283 (1972) (emphasis added).

we submit, acted correctly in applying *Fortnightly* and *Teleprompter* to the facts in the instant case and reached the proper result.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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March, 1975.

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-462

TWENTIETH CENTURY MUSIC CORPORATION and MARY M. BOURNE,

Petitioners,

v.

GEORGE AIKEN,

Respondent.

REPLY BRIEF FOR PETITIONERS

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-452

TWENTIETH CENTURY MUSIC CORPORATION
and MARY M. BOURNE,

Petitioners,

v.

GEORGE AIKEN,

Respondent.

REPLY BRIEF FOR PETITIONERS

Petitioners believe it will be useful to the Court if we address several points raised by respondent's brief. These include respondent's misleading account of recent legislative history, the assertion that the doctrine of *Jewell-LaSalle* is somehow contrary to the objectives of the Copyright and Communications Acts, the notion that *Jewell-LaSalle* should be read to apply only where the broadcaster is unlicensed, respondent's curious response to the reliance issue, and the suggestion that this Court should now entertain respondent's belated contention that the performance here was not "for profit."

A. Respondent Misstates Recent Legislative History

Petitioners' main brief set out at length the long and active history of legislative response to this Court's unanimous decision in *Buck* v. *Jewell-LaSalle Company*, 283 U.S. 191 (1931). There was a dual purpose: First, we wished to demonstrate that *Jewell-LaSalle* is not an anachronism, that both in this country and abroad there has universally been carefully considered acceptance of the rule that a restaurant owner or hotel keeper who disseminates broadcast music over loudspeakers to entertain customers and employees thereby "performs" such music for copyright purposes. Second, we wished to establish that there has been here the kind of legislative assent that has previously led this Court to adhere even to questionable precedent. See *Flood* v. *Kuhn*, 407 U.S. 258 (1972), and the other cases cited at page 29 of our main brief.*

* In this connection, we note that in *White-Smith Music Co.* v. *Apollo Co.*, 209 U.S. 1 (1908), to decide whether perforated paper used in piano rolls were "copies" of musical compositions for copyright purposes, this Court carefully reviewed and followed the leading British cases and those of lower American courts, relying as well upon the fact that, knowing of these cases, the Congress had repeatedly omitted to overrule them by legislation, "an acquiescence in the judicial construction given to the copyright laws." 209 U.S. at 14.

The lower court American cases, the British precedents and legislative acquiescence in those decisions led the Court in *Apollo* to decide against the claims of copyright proprietors (which decision happened also to preserve the status quo in the industry). Concurring specially, Mr. Justice Holmes pointed out that although the result of the decision was "to give the copyright less scope than its rational significance", he did not feel justified in dissenting, "[i]n view of the facts and opinions in this country and abroad to which my brother Day has called attention." 209 U.S. at 18-19. As was so often the case, Mr. Justice Holmes' more generous position as to the scope of copyright eventually prevailed. See his landmark opinion for the Court in *Herbert* v. *Shanley Co.*, 242 U.S. 591 (1917), and the comparable opinion by Mr. Justice Brandeis for a unanimous Court in *Jewell-LaSalle*.

Respondent does not challenge petitioners' contention that *Jewell-LaSalle* has been regularly incorporated by Congress in bill after bill. He seeks, however, to blunt the thrust of this argument, and to support his own "policy" argument, by asserting that in 1961, as "the culmination of extensive studies" (Brief for Respondent, p. 21), the Register of Copyrights advised the Congress that, pursuant to a supposed "principle" of "clearance at the source," broadcasters should bear the burden of compensating copyright proprietors for broadcast music disseminated in hotels, restaurants and other public places. Respondent also alleged that the language of S. 1361, the comprehensive revision bill which passed the Senate in September of 1974, would exempt him from liability. Both contentions rest upon a misleading account of the legislative history.

1. Respondent's Misstatement of the Copyright Office's Position

In 1961, the Copyright Office did indeed propose to the Congress that, as a policy matter, broadcasters should be made to bear the entire burden of compensating copyright proprietors for "performances" of broadcast music in hotels, restaurants and other public places. But respondent failed to apprise this Court of the fact that the Copyright Office soon abandoned this position.

The 1961 report was not the "culmination" of extensive studies—it was only a tentative position paper based on prior studies whose sole purpose was "to furnish a tangible core around which opinions and conclusions could crystalize."* Based upon responses to this position paper,

* So the Copyright Office described its earlier Report in 1965. See Copyright Law Revision, Part 6, Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, May 1965, page ix [hereinafter, the "Supplementary Report"].

the Copyright Office in 1963 published a preliminary draft of proposed legislation, still only "an experimental device for provoking discussion and suggestions." Supplementary Report, at page xi. In this draft, unmentioned by respondent, the Copyright Office adopted a position consistent with the well established practice following *Jewell-LaSalle*. After publication of the preliminary draft, discussion conferences were held in Washington with representatives of all interested government agencies (including the FCC), the Judiciary Committees of the Congress, and other public and private parties. At one of these conferences, Barbara Ringer (then speaking for the Copyright Office, and now Register of Copyrights) confessed that "clearance at the source" had never been relied upon as a governing principle, but only as an "analogy." She admitted that "there really was not very much support for the recommendation as presented in the [1961] Report . . . We came to realize that this whole problem is really a much more complicated one than the Report suggests."* She explained that while the Copyright Office continued to believe that retransmissions to a hotel's *private* rooms should be exempt, liability should continue to be imposed where the broadcast is communicated to a *public* room by a loudspeaker system.** No one in the group to whom she was speaking, including Robert D. Greenburg of the FCC and representatives of the broadcast and performing rights industries, disagreed. The Register's Supplementary Report of 1965 advanced the position, later reflected in S. 1361 and entirely consistent with ASCAP's well-known licensing

* Copyright Law Revision, Part 3, Preliminary Draft for Revised U. S. Copyright Law and Discussion and Comments on the Draft, September 1964, page 238.

** *Id.*, at 240-41.

practices, that reproduction of radio broadcasts by loudspeakers in public places constitute "performances" with resulting liability, but that the use of only an "ordinary" radio set like those commonly sold for "private home use" should be exempted as a policy matter. Supplementary Report, at xix, 44. None of this found its way into respondent's brief.

2. Respondent's Misstatements Regarding S. 1361

Respondent's account of his alleged exemption under S. 1361 is equally misleading. At page 26 of his brief, respondent alleges that, under S. 1361, he would not be "an infringer on the facts of this case" because he did not charge an admission fee and the broadcasts were not "further transmitted to the public." Yet as S. 1361 was drafted, the exemption where no admission fee is charged, or where no further transmission to the public (*i.e.*, by means of loudspeakers) takes place, applies only to those who use a "single receiving apparatus of a kind commonly used in private homes." But one, like respondent, who uses receiving apparatus other than the single set commonly used in private homes is liable for infringement whether or not he charges admission or further transmits. Indeed, under S. 1361, respondent's acts are clearly "performances" as the term is defined by that bill. This is made abundantly clear by the report of the Senate Judiciary Committee.*

* Sen. Rep. No. 93-983, 93d Cong., 2d Sess. 113 (1974):

"Under the definitions of 'perform,' 'display,' 'publicly,' and 'transmit' in section 101, the concepts of public performance and public display cover not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public. Thus, for example: a singer is performing when he sings a song; a broad-

(footnote continued on next page)

Respondent, with his five loudspeakers, simply does not fit within the bill's exception.

The Senate report makes clear that the purpose of the statutory language was to codify the rule of *Jewell-LaSalle*, the known licensing practices of ASCAP, and the position of the Copyright Office since at least 1965. That rule imposes liability upon respondent, who deployed five loudspeakers in various rooms of his restaurant to entertain his customers and employees.

B. *Jewell-LaSalle* Carries Out the Objectives of the Copyright Act of 1909 and the Communications Act.

Respondent advances an ingenious but erroneous argument that *Jewell-LaSalle* generates a second or windfall payment to the copyright proprietor, and that to the extent restaurant owners and hotel keepers are made liable for such a second payment, they will opt to turn off their radios, thereby denying to the listening public the benefits of copyrighted music and wide access to radio communications.

The position is fallacious. First, it perverts the Copyright Office's alleged "principle" of "clearance at the source." In 1961, the Copyright Office did seem to suggest such a "principle" and it proposed that only broadcasters

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casting network is performing when it transmits his performance (whether simultaneously or from records); a local broadcaster is performing when it transmits the network broadcast; a cable television system is performing when it retransmits the broadcast to its subcribers; and *any individual is performing whenever he plays a phonorecord embodying the performance or communicates the performance by turning on a receiving set.*" (Emphasis added.)

should be liable for performances of broadcast music in restaurants, hotels and other public places. The retraction of that "principle" by the Copyright Office has been described above. But even that "principle" does not lead to respondent's conclusion. "Clearance at the source" is logically consistent with *Jewell-LaSalle,* for it recognizes that a restaurant owner or hotel keeper does "perform" when he disseminates broadcast music over loudspeakers. It merely transfers the burden of enforcement and collection to a more centralized source, the broadcaster. The idea was, after all, known to and considered by this Court in *Jewell-LaSalle;* Mr. Justice Brandeis observed that the Seventy-First Congress had rejected just such a mode for enforcing performance rights. 283 U.S. at 199 and n.6.

A second fallacy resides in the suggestion that the Copyright Act of 1909 prefers public access to copyrighted works even at the expense of their creators. The cases* cited by respondent do not support that proposition.**

The fact is that the Copyright Act of 1909, construed by this Court in *Jewell-LaSalle,* reserves exclusively to the copyright proprietor certain rights, including the right to

* *United States* v. *Paramount Pictures,* 334 U.S. 131 (1948); *Mazer* v. *Stein,* 347 U.S. 201 (1954).

** *Paramount,* an antitrust case, held that while reward to authors served to benefit the public by inducing release to the public of the products of creative genius, that public purpose was thwarted by the abuse of antitrust law that had taken place. 334 U.S. at 158. *Mazer* clearly supports the basic philosophy underlying our copyright law—that the public is served when creators are paid for use of their works. The Court observed that: "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered." 347 U.S. at 219.

perform publicly for profit. If particular conduct constitutes a public performance for profit, the performer requires the consent of the copyright proprietor. So the Act states. This Court in *Jewell-LaSalle* held that public dissemination of broadcast music at the point of reception is a "performance." It reached that conclusion after considering the purposes and objectives of the Copyright Act. As our main brief demonstrated, that conclusion accords with the consensus reached around the world and reflected in all recent legislative proposals.

Moreover, the "windfall" concept is itself without foundation. As the record shows, the licenses negotiated with radio broadcasters have for many years expressly taken into account the fact that *Jewell-LaSalle* created an additional source of license fees. Radio broadcasters thus do not pay for performances occurring at commercial establishments—those performances are paid for only once, by the operators of those establishments.

The suggestion that *Jewell-LaSalle* is inconsistent with the Communications Act because it will cause operators of commercial establishments to turn off their radios and thus deprive the public of dissemination of broadcasts, is without foundation. If this Court were being asked, *as a matter of first impression,* to rule that commercial establishments like respondent's must secure licenses from copyright owners, it might conceivably speculate as to the effect such a rule would have on the frequency with which radios were used in public places. But it is not petitioners who advocate a new rule. We urge only that this Court adhere to a rule already over 40 years old, and under which many commercial establishments choose to use radio broadcasts over

loudspeakers and obtain appropriate licenses. Adherence to the status quo cannot conceivably shut off their radios.

Moreover, the claim that adherence to *Jewell-LaSalle* will create radio silence is not credible on this record. Respondent himself testified that the license fee in question, $5 a month, was only "a penny ante thing." Appendix, p. 61A. He did not testify that he had been harassed by multiple claimants for license fees, or that he would remove his radio and multiple speaker system if he, or his sponsors, lost this case. On the contrary, he swore that if *Jewell-LaSalle* were uphheld, "I will pay." *Ibid.*

C. There Is No Basis for Confining *Jewell-LaSalle* to Unlicensed Broadcasts.

Respondent contends that this Court should confine *Jewell-LaSalle* exclusively to situations where the broadcaster is unlicensed and would not itself provide a source of compensation to the copyright proprietors. Our main brief notes that nothing in the opinion or rationale of *Jewell-LaSalle* supports such a narrow construction, and that since Judge Wolsey's decision in *Society of European S.A.A.C.* v. *New York Hotel Statler Company*, 19 F.Supp. 1 (S.D.N.Y. 1937), the rule has been uniformly applied without regard to whether the broadcaster was licensed.

It is also noteworthy that in the extensive discussions conducted by the Copyright Office between 1961 and 1965, not one of the participants—neither the Copyright Office, government agency spokesmen, Judiciary Committee representatives, broadcasters, nor anyone else—suggested that any significance be accorded to whether a particular broad-

cast was licensed. And there is no trace of any such distinction in the legislative history of the proposals placed before the Congress.

D. Respondent Seeks to Evade the Reliance Issue by Misstating Muzak's Position.

In addition to contending that the substantial revenues directly jeopardized by the decision below are unimportant, respondent seeks to minimize the impact of overturning *Jewell-LaSalle* by misstating the position of the background music operators. Respondent asserts that the overruling of *Jewell-LaSalle* would not affect ASCAP'S revenues from background music operators because they will continue to need licenses and to pay royalties. Respondent's brief at page 28. But the threat to the revenues derived from background music operators does not arise from concern that they would escape liability. The argument advanced before the trial court by counsel for Muzak and its affiliates (the same counsel who have undertaken representation of respondent in this Court) is that the availability of free broadcast music would diminish the competitive position of the background music operators, force them to lower their own charges, and cause them to seek reduction in the fees they pay to ASCAP. Surely counsel for respondent have not forgotten the arguments they advanced as counsel for Muzak both below and in the pending proceeding for determination of reasonable license fees in the Southern District of New York.

E. This Court Should Not Now Consider the "Not for Profit" Argument Belatedly Advanced by Respondent.

Respondent belatedly suggests, at pages 13-15 of his brief, that this Court should rule that even if his were a "performance," it was "not for profit." His theory is that he sells hamburgers, not music. To adopt the suggestion would overturn much of modern copyright law, for no court and no legislature has imposed, as a condition of copyright liability, that music be sold as such.* The establishments in such cases as *Jewell-LaSalle* and *Herbert* v. *Shanley Co.*, 242 U.S. 591 (1917) and their numerous progeny sold meals or lodgings and meals, not music. As Mr. Justice Holmes wrote in *Herbert*, 242 U.S. at 594-95:

> "If the rights under the copyright are infringed only by a performance where money is taken at the door they are very imperfectly protected. Performances not different in kind from those of the defendants could be given that might compete with and even destroy the success of the monopoly that the law intends the plaintiffs to have. It is enough to say that there is no need to construe the statute so narrowly. The defendants' performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order, is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers

* Although the imposition of an admission charge may transmute an otherwise exempt act, such as a jukebox performance, into an infringing act. 17 U.S.C. §1(e), last paragraph.

> of conversation or disliking the rival noise give a luxurious pleasure not to be had from eating a silent meal. If music did not pay it would be given up. If it pays it pays out of the public's pocket. Whether it pays or not the purpose of employing it is profit and that is enough."

In any event, the issue is not properly before this Court. It was not pressed below. It was not raised in respondent's brief in opposition to the petition for certiorari. And no cross-petition was filed to bring the issue before the court. To hold now that there is no infringement except where a performer sells music as such, and not where he simply performs such music to please customers and employees, would vastly widen the scope of the decision below, wreaking havoc with the revenues upon which authors, composers and publishers of musical works depend. In these circumstances it is the practice of this Court not to entertain such a belatedly raised issue. See *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 381 n.4 (1970), and cases there cited; Stern & Gressman, *Supreme Court Practice* 314-15 (4th ed. 1969).

Conclusion

For over 40 years the Nation's authors, composers and music publishers have entered into business arrangements with broadcasters and commercial establishments in reliance upon this Court's unanimous decision in *Jewell-LaSalle*. The line drawn by the Court in that case has won the support of courts and legislatures throughout the world, and it is reflected in current revision bills as well as those passed by the Senate in 1974 and the House of Representatives in 1967. The monies involved are "penny ante" from

the perspective of licensees like Aiken, but they are important in the aggregate to those who make our music. Relationships developed over 40 years between the creators of music and their public should not be disrupted on the basis of ill-conceived distinctions, unsound "policy" arguments, or misleading descriptions of the history of congressional action.

Respectfully submitted,

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April, 1975

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

TWENTIETH CENTURY MUSIC CORP. ET AL. *v.* AIKEN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 74-452. Argued April 21, 1975—Decided June 17, 1975

Petitioners' copyrighted songs were received on the radio in respondent's food shop from a local broadcasting station, which was licensed by the American Society of Composers, Authors and Publishers to perform the songs, but respondent had no such license. Petitioners then sued respondent for copyright infringement. The District Court granted awards, but the Court of Appeals reversed. *Held:* Respondent did not infringe upon petitioners' exclusive right, under the Copyright Act, "[t]o perform the copyrighted work publicly for profit," since the radio reception did not constitute a "performance" of the copyrighted songs. *Fortnightly Corp.* v. *United Artists*, 392 U. S. 390; *Teleprompter Corp.* v. *CBS*, 415 U. S. 394. To hold that respondent "performed" the copyrighted works would obviously result in a wholly unenforceable regime of copyright law, and would also be highly inequitable, since (short of keeping his radio turned off) one in respondent's position would be unable to protect himself from infringement liability. Such a ruling, moreover, would authorize the sale of an untold number of licenses for what is basically a single rendition of a copyrighted work, thus conflicting with the balanced purpose of the Copyright Act of assuring the composer an adequate return for the value of his composition while at the same time protecting the public from oppressive monopolies. Pp. 3-13.

500 F. 2d 127, affirmed.

STEWART, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed an opinion concurring in the result. BURGER, C. J., filed a dissenting opinion, in which DOUGLAS, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 74-452

Twentieth Century Music Corporation et al., Petitioners, v. George Aiken.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[June 17, 1975]

MR. JUSTICE STEWART delivered the opinion of the Court.

The question presented by this case is whether the reception of a radio broadcast of a copyrighted musical composition can constitute copyright infringement, when the copyright owner has licensed the broadcaster to perform the composition publicly for profit.

I

The respondent George Aiken owns and operates a small fast-service food shop in downtown Pittsburgh, Pennsylvania, known as "George Aiken's Chicken." Some customers carry out the food they purchase, while others remain and eat at counters or booths. Usually the "carry-out" customers are in the restaurant for less than five minutes, and those who eat there seldom remain longer than 10 or 15 minutes.

A radio with outlets to four speakers in the ceiling receives broadcasts of music and other normal radio programing at the restaurant. Aiken usually turns on the radio each morning at the start of business. Music, news, entertainment, and commercial advertising broad-

cast by radio stations are thus heard by Aiken, his employees, and his customers during the hours that the establishment is open for business.

On March 11, 1972, broadcasts of two copyrighted musical compositions were received on the radio from a local station while several customers were in Aiken's establishment. Petitioner Twentieth Century Music Corporation owns the copyright on one of these songs, "The More I See You"; petitioner Mary Bourne the copyright on the other, "Me and My Shadow." Petitioners are members of the American Society of Composers, Authors and Publishers (ASCAP), an association that licenses the performing rights of its members to their copyrighted works. The station that broadcast the petitioners' songs was licensed by ASCAP to broadcast them.[1] Aiken, however, did not hold a license from ASCAP.

The petitioners sued Aiken in the United States District Court for the Western District of Pennsylvania to recover for copyright infringement. Their complaint alleged that the radio reception in Aiken's restaurant of the licensed broadcasts infringed their exclusive rights to "perform" their copyrighted works in public for profit. The District Judge agreed, and granted statutory monetary awards for each infringement. 356 F. Supp. 271.

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[1] For a discussion of ASCAP, see *K–91, Inc.* v. *Gershwin Publishing Corp.*, 372 F. 2d 1 (CA9).

ASCAP's license agreement with the Pittsburgh broadcasting station contained, as is customary, the following provision:

"Nothing herein contained shall be construed as authorizing Licensee [WKJF–FM] to grant to others any right to reproduce or perform publicly for profit by any means, method or process whatsoever of the musical compositions licensed hereunder or as authorizing any receiver of any radio broadcast to perform publicly or reproduce the same for profit, by any means, method or process whatsoever."

The United States Court of Appeals for the Third Circuit reversed that judgment, 500 F. 2d 127, holding that the petitioners' claims against the respondent were foreclosed by this Court's decisions in *Fortnightly Corp.* v. *United Artists*, 392 U. S. 390, and *Teleprompter Corp.* v. *CBS*, 415 U. S. 394. We granted certiorari. 419 U. S. 1067.

II

The Copyright Act of 1909, 35 Stat. 1075, as amended, 17 U. S. C. § 1 *et seq.*,[2] gives to a copyright holder a monopoly limited to specified "exclusive" rights in his copyrighted works.[3] As the Court explained in *Fortnightly Corp.* v. *United Artists, supra:*

"The Copyright Act does not give a copyright

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[2] The Constitution gives Congress the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive right to their respective Writings and Discoveries." U. S. Const., Art. 1, § 8, cl. 8. See, *e. g., Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U. S. 53, 58; *Trade-Mark Cases*, 100 U. S. 82, 94.

[3] 17 U. S. C. § 1 provides:

"Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

"(a) To print, reprint, publish, copy, and vend the copyrighted work;

"(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art;

"(c) To deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address or similar production, or other nondramatic literary work; to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by

holder control over all uses of his copyrighted work. Instead, § 1 of the Act enumerates several 'rights' that are made 'exclusive' to the holder of the copyright. If a person, without authorization from the copyright holder, puts a copyrighted work to a use within the scope of one of these 'exclusive rights,' he infringes the copyright. If he puts the work to a use not enumerated in § 1, he does not infringe." *Id.*, at 393–395.

Accordingly, if an unlicensed use of a copyrighted work does not conflict with an "exclusive" right conferred by the statute, it is no infringement of the holder's

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any method be exhibited, delivered, presented, produced, or reproduced; and to play or perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever. The damages for the infringement by broadcast of any work referred to in this subsection shall not exceed the sum of $100 where the infringing broadcaster shows that he was not aware that he was infringing and that such infringement could not have been reasonably foreseen; and

"(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce or reproduce it in any manner or by any method whatsoever; and

"(e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced . . . ." 17 U. S. C. § 1.

rights. No license is required by the Copyright Act, for example, to sing a copyrighted lyric in the shower.[4]

The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution,[5] reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.[6] The immediate effect of our copyright law is to secure a fair return for an "author's" creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. "The sole interest of the United States and the primary object in conferring the monopoly," this Court has said, "lie in the general benefits derived by the public from the labors of authors." *Fox Film Corp.* v. *Doyal*, 286 U. S. 123, 127. See *Kendall* v. *Winsor*, 21 How. 322, 327–328; *Grant* v. *Raymond*, 6 Pet. 218, 241–242. When technological change has rendered its literal

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[4] Cf. *Wall* v. *Taylor*, 11 W. B. D. 106–107 (1882) (Brett, M. R.): "Singing for one's own gratification without intending thereby to represent anything, or to amuse anyone else, would not, I think, be either a representation or a performance, according to the ordinary meaning of those terms, nor would the fact of some other person being in the room at the time of such singing make it so . . . ."

[5] See M. Nimmer, Copyright § 5 (1974).

[6] Lord Mansfield's statement of the problem almost 200 years ago in *Sayre* v. *Moore*, 1 East 361n., 102 Eng. Rep. 139n. (K. B. 1785) bears repeating:

"[W]e must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labor; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded."

terms ambiguous, the Copyright Act must be construed in light of this basic purpose.[7]

The precise statutory issue in the present case is whether Aiken infringed upon the petitioners' exclusive right, under the Copyright Act of 1909, 35 Stat. 1075, as amended, 17 U. S. C. § 1 (e), "[t]o perform the copyrighted work publicly for profit."[8] We may assume that the radio reception of the musical compositions in Aiken's restaurant occurred "publicly for profit." See *Herbert* v. *Shanley*, 242 U. S. 591. The dispositive question, therefore, is whether this radio reception constituted a "performance" of the copyrighted works.

When this statutory provision was enacted in 1909, its purpose was to prohibit unauthorized performances of copyrighted musical compositions in such public places as concert halls, theaters, restaurants, and cabarets. See H. R. Rep. No. 2222, 60th Cong., 2d Sess. (1909). An orchestra or individual instrumentalist or singer who performs a copyrighted musical composition in such a public place without a license is thus clearly an infringer under the statute. The entrepreneur who sponsors such a public performance for profit is also an infringer—direct or contributory. See generally M. Nimmer, Copyright §§ 102, 134 (1974). But it was never contemplated that the members of the audience who heard the composition would themselves also be simultaneously

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[7] In *Fortnightly Corp.* v. *United Artists*, 392 U. S. 390, the Court stated:

"[O]ur inquiry cannot be limited to ordinary meaning and legislative history, for this is a statute that was drafted long before the development of the electronic phenomena with which we deal here. In 1909 radio itself was in its infancy, and television had not been invented. We must read the statutory language of 60 years ago in the light of drastic technological change." *Id.*, at 395–396 (footnotes omitted).

[8] See n. 2, *supra*.

"performing," and thus also guilty of infringement. This much is common ground.

With the advent of commercial radio, a broadcast musical composition could be heard instantaneously by an enormous audience of distant and separate persons operating their radio receiving sets to reconvert the broadcast to audible form.[9] Although Congress did not revise the statutory language, copyright law was quick to adapt to prevent the exploitation of protected works through the new electronic technology. In short, it was soon established in the federal courts that the broadcast of a copyrighted musical composition by a commercial radio station was a public performance of that composition for profit—and thus an infringement of the copyright if not licensed. In one of the earliest cases so holding, the Sixth Circuit Court of Appeals said:

> "While the fact that the radio was not developed at the time the Copyright Act . . . was enacted may raise some question as to whether it properly comes within the purview of the statute, it is not by that fact alone excluded from the statute. In other words, the statute may be applied to new situations not anticipated by Congress, if, fairly construed, such situations come within its intent and meaning. . . . While statutes should not be stretched to apply to new situations not fairly within their scope, they should not be so narrowly construed as to permit their evasion because of changing habits due to new inventions and discoveries.
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> . . . . . .
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> "A performance, in our judgment, is no less public

[9] Station KDKA, established in Pittsburgh in 1920, is said to have been the first commercial radio broadcasting station in the world. See *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U. S. 191, 197 n. 2.

> because the listeners are unable to communicate with one another, or are not assembled within an inclosure, or gathered together in some open stadium or park or other public place. Nor can a performance, in our judgment, be deemed private because each listener may enjoy it alone in the privacy of his home. Radio broadcasting is intended to, and in fact does, reach a very much larger number of the public at the moment of the rendition than any other medium of performance. The artist is consciously addressing a great, though unseen and widely scattered, audience, and is therefore participating in a public performance." *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.*, 5 F. 2d 411–412 (1925).

See also *M. Witmark & Sons* v. *L. Bamberger & Co.*, 291 F. 776 (NJ 1923); *Jerome H. Remick & Co.* v. *General Electric Co.*, 4 F. 2d 160 (SDNY, 1924); *Jerome H. Remick & Co.* v. *General Electric Co.*, 16 F. 2d 829 (SDNY, 1926); *Associated Music Publishers, Inc.*, v. *Debs Memorial Radio Fund*, 141 F. 2d 852 (CA2, 1944). Cf. *Chappell & Co.* v. *Associated Radio Co. of Australia, Ltd.*, [1925] Vict. L. R. 350; *Messager* v. *British Broadcasting Co., Ltd.*, [1927] 2 K. B. 543, rev'd on other grounds, [1928] 1 K. B. 660, aff'd, [1929] A. C. 151. See generally Caldwell, Broadcasting of Copyrighted Works, 1 J. Air L. 584 (1930); Note, 75 U. of Pa. L. Rev. 549 (1927); Note, 39 Harv. L. Rev. 269 (1925).

If, by analogy to a live performance in a concert hall or cabaret, a radio station "performs" a musical composition when it broadcasts it, the same analogy would seem to require the conclusion that those who listen to the broadcast through the use of radio receivers do not perform the composition. And that is exactly what the early federal cases held. "Certainly those who listen do not perform, and therefore do not infringe." *Jerome*

H. Remick & Co. v. *General Electric Co.*, 16 F. 2d 829. "One who manually or by human agency merely actuates electrical instrumentalities, whereby inaudible elements that are omnipresent in the air are made audible to persons who are within hearing, does not 'perform' within the meaning of the Copyright Law." *Buck* v. *Debaum*, 40 F. 2d 734, 735 (SD Cal. 1929).

Such was the state of the law when this Court in 1931 decided *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U. S. 191. In that case the Court was called upon to answer the following question certified by the Eighth Circuit Court of Appeals: "Do the acts of a hotel proprietor, in making available to his guests, through the instrumentality of a radio receiving set and loud speakers installed in his hotel and under the control and for the entertainment of his guests, the hearing of a copyrighted musical composition which has been broadcast from a radio transmitting station, constitute a performance of such composition within the meaning of 17 USC, Sec. 1 (e)?" The Court answered the certified question in the affirmative. In stating the facts of the case, however, the Court's opinion made clear that the broadcaster of the musical composition was not licensed to perform it, and at least twice in the course of its opinion the Court indicated that the answer to the certified question might have been different if the broadcast itself had been authorized by the copyright holder.[10]

We may assume for present purposes that the *Jewell-LaSalle* decision retains authoritative force in a factual situation like that in which it arose.[11] But, as the Court

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[10] "[W]e have no occasion to determine under what circumstances a broadcaster will be held to be a performer, *or the effect upon others of his paying a license fee.*" 283 U. S., at 198 (emphasis added). See also 283 U. S., at 199 n. 5.

[11] The decision in *Jewell-LaSalle* might be supported by a concept akin to that of contributory infringement, even though there

of Appeals in this case perceived, this Court has in two recent decisions explicitly disavowed the view that the reception of an electronic broadcast can constitute a performance, when the broadcaster himself is licensed to perform the copyrighted material that he broadcasts. *Fortnightly Corp.* v. *United Artists*, 392 U. S. 390; *Teleprompter Corp.* v. *CBS*, 415 U. S. 394.

The language of the Court's opinion in the *Fortnightly* case could hardly be more explicitly dispositive of the question now before us:

> "The television broadcaster in one sense does less than the exhibitor of a motion picture or stage play; he supplies his audience not with visible images but only with electronic signals. The viewer conversely does more than a member of a theater audience; he provides the equipment to convert electronic signals into audible sound and visible images. Despite these deviations from the conventional situation contemplated by the framers of the Copyright Act, broadcasters have been judicially treated as exhibitors, and viewers as members of a theater audience. Broadcasters perform. Viewers do not perform. Thus, while both broadcaster and viewer play crucial roles in the total television process, a line is drawn between them. One is treated as active performer; the other, as passive beneficiary." *Fortnightly Corp.* v. *United Artists*, 392 U. S., at 398–399 (footnotes omitted).

The *Fortnightly* and *Teleprompter* cases, to be sure, involved television, not radio, and the copyrighted materials there in issue were literary and dramatic works, not musical compositions. But, as the Court of

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was no relationship between the broadcaster and the hotel company and, therefore, technically no question of actual contributory infringement in that case. 283 U. S., at 197 n. 4.

Appeals correctly observed, "[i]f *Fortnightly* with its elaborate CATV plant and *Teleprompter* with its even more sophisticated and extended technological and programming facilities was not 'performing,' then logic dictates that no 'performance' resulted when the [respondent] merely activated his restaurant radio." 500 F. 2d, at 137.

To hold in this case that the respondent Aiken "performed" the petitioners' copyrighted works would thus require us to overrule two very recent decisions of this Court. But such a holding would more than offend the principles of *stare decisis;* it would result in a regime of copyright law that would be both wholly unenforcible and highly inequitable.

The practical unenforcibility of a ruling that all of those in Aiken's position are copyright infringers is self-evident. One has only to consider the countless business establishments in this country with radio or television sets on their premises—bars and beauty shops, cafeterias and car washes, dentists' offices and drive-ins—to realize the total futility of any evenhanded effort on the part of copyright holders to license even a substantial percentage of them.[12]

And a ruling that a radio listener "performs" every broadcast that he receives would be highly inequitable for two distinct reasons. First, a person in Aiken's position would have no sure way of protecting himself from liability for copyright infringement except by keeping his

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[12] The Court of Appeals observed that ASCAP now has license agreements with some 5,150 business establishments in the whole country, 500 F. 2d, at 129, noting that these include "firms which employ on premises sources for music such as tape recorders and live entertainment." *Id.*, at n. 4. As a matter of so-called "policy" or "practice," we are told, ASCAP has not even tried to exact licensing agreements from commercial establishments whose radios have only a single speaker.

radio set turned off. For even if he secured a license from ASCAP, he would have no way of either foreseeing or controlling the broadcast of compositions whose copyright was held by someone else.[13] Secondly, to hold that all in Aiken's position "performed" these musical compositions would be to authorize the sale of an untold number of licenses for what is basically a single public rendition of a copyrighted work. The exaction of such multiple tribute would go far beyond what is required for the economic protection of copyright owners,[14] and

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[13] This inequity, in the context of the decision in *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U. S. 191, was pointed out by Professor Zechariah Chafee, Jr., 30 years ago:

"A rule which is very hard for laymen to apply so as to keep clear of litigation was estabilshed by the *LaSalle Hotel* case. The hotel was heavily liable if it rebroadcast unlicensed music, but how could it protect itself? Must it maintain a monitor always on the job to sit with a list before him pages long showing what pieces are licensed and turn off the master set the instant an unlicensed piece comes from the broadcasting? The dilemma thus created by the Copyright Act was mitigated for a time by the machinery of ASCAP, which was a device entirely outside the statute. The hotel could obtain a blanket license from ASCAP and thus be pretty sure of safety about all the music which came through its master set. . . . [But] if any composer outside the ASCAP has his music broadcast, what is the hotel to do? Besides getting an ASCAP license, must the hotel bargain separately with every independent composer on the chance that his music may come through to the hotel patrons?

"Such divergences from the ideal . . . are likely to be corrected. . . ." Reflections on the Law of Copyright I, 45 Colum. L. Rev. 503, 528–529.

[14] The petitioners have not demonstrated that they cannot receive from a broadcaster adequate royalties based upon the total size of the broadcaster's audience. On the contrary, the respondent points out that generally copyright holders can and do receive royalties in proportion to advertising revenues of licensed broadcasters, and a broadcaster's advertising revenues reflect the total number of its listeners, including those who listen to the broadcasts in public business establishments.

would be wholly at odds with the balanced congressional purpose behind 17 U. S. C. § 1 (e):

> "The main object to be desired in expanding copyright protection accorded to music has been to give to the composer an adequate return for the value of his composition, and it has been a serious and a difficult task to combine the protection of the composer with the protection of the public, and to so frame an act that it would accomplish the double purpose of securing to the composer an adequate return for all use made of his composition and at the same time prevent the formation of oppressive monopolies, which might be founded upon the very rights granted to the composer for the purpose of protecting his interests." H. R. Rep. No. 2222, 60th Cong., 2d Sess., at 7 (1909).

For the reasons stated in this opinion, the judgment of the Court of Appeals is affirmed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 74-452

Twentieth Century Music Corporation et al., Petitioners, *v.* George Aiken.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[June 17, 1975]

MR. JUSTICE BLACKMUN, concurring in the result.

My discomfort, now decisionally outdated to be sure, with the Court's opinion and judgment is threefold:

1. My first discomfort is factual. Respondent Aiken hardly was an innocent "listener," as the Court seems to characterize him throughout its opinion and particularly on pages 11 and 12 thereof. In one sense, of course, he was a listener, for as he operated his small food shop and served his customers, he heard the broadcasts himself. Perhaps his work was made more enjoyable by the soothing and entertaining effects of the music. With this aspect I would have no difficulty.

But respondent Aiken installed four loudspeakers in his small shop. This, obviously, was not done for his personal use and contentment so that he might hear the broadcast, in any corner he might be, above the noise of commercial transactions. It was done for the entertainment and edification of his customers. It was part of what Mr. Aiken offered his trade, and it added, in his estimation, to the atmosphere and attraction of his establishment. Viewed in this light, respondent is something more than a mere listener and is not so simply to be categorized.

2. My second discomfort is precedential. Forty-four years ago, in a unanimous opinion written by Mr. Justice Brandeis, this Court held that a hotel proprietor's use of a radio receiving set and loudspeakers for the entertainment of hotel guests constituted a performance within the meaning of § 1 of the Copyright Act. *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U. S. 191 (1931). For more than 35 years the rule in *Jewell-LaSalle* was a benchmark in copyright law and was the foundation of a significant portion of the rather elaborate licensing agreements that evolved with the developing media technology. Seven years ago the Court, by a five to one vote, and with three Justices not participating, held that a community antenna television (CATV) station that transmitted copyrighted works to home subscribers was not performing the works, within the meaning of § 1 of the Copyright Act. *Fortnightly Corp.* v. *United Artists*, 392, U. S. 390 (1968). The divided Court only briefly noted the relevance of *Jewell-LaSalle* and announced that that decision "must be understood as limited to its own facts." *Id.*, at 396–397, n. 18. I have already indicated my disagreement with the reasoning of *Fortnightly* and my conviction that it, rather than *Jewell-LaSalle*, is the case that should be limited to its facts. *Teleprompter Corp.* v. *CBS*, 415 U. S. 394, 415 (1974) (dissenting opinion.) I was there concerned about the Court's simplistic view of television's complications, a view perhaps encouraged by the obvious inadequacies of an ancient copyright act for today's technology. A majority of the Court, however, felt otherwise and extended the simplistic analysis rejected in *Jewell-LaSalle*, but embraced in *Fortnightly*, to even more complex arrangements in the CATV industry. *Teleprompter Corp.* v. *CBS*, *supra*.

I had hoped, secondarily, that the reasoning of *Fortnightly* and *Teleprompter* would be limited to CATV.

At least in that context the two decisions had the arguably desirable effect of protecting an infant industry from a premature death. Today, however, the Court extends *Fortnightly* and *Teleprompter* into radio broadcasting, effectively overrules *Jewell-LaSalle*, and thereby abrogates more than 40 years of established business practices. I would limit the application of *Teleprompter* and *Fortnightly* to the peculiar industry that spawned them. Parenthetically, it is of interest to note that this is precisely the result that would be achieved by virtually all versions of proposed revisions of the Copyright Act. See, *e. g.*, S. 1361, 93d Cong., 2d Sess. § 110 (5). See, also, §§ 48 (5) and (6) of the British Copyright Act of 1956 which distinguishes between the use of a radio in a public place and "the causing of a work or other subject-matter to be transmitted to subscribers to a diffusion service."

Resolution of these difficult problems and the fashioning of a more modern statute are to be expected from the Congress. In any event, for now, the Court seems content to continue with its simplistic approach and to accompany it with a pragmatic reliance on the "practical unenforceability," *ante*, p. 11, of the copyright law against persons such as George Aiken.

3. My third discomfort is tactical. I cannot understand why the Court is so reluctant to do directly what it obviously is doing indirectly, namely, to overrule *Jewell-LaSalle*. Of course, in my view, that decision was correct at the time it was decided, and I would regard it as good law today under the identical statute and with identical broadcasting. But, as I have noted, the Court in *Fortnightly* limited *Jewell-LaSalle* "to its own facts," and in *Teleprompter* ignored its existence completely by refusing even to cite it. This means, it seems to me, that the Court did not want to overrule it, but never-

theless did not agree with it and felt, hopefully, that perhaps it would not bother us anymore anyway. Today the Court does much the same thing again by extracting and discovering great significance in the fact that the broadcaster in *Jewell-LaSalle* was not licensed to perform the composition. I cannot join the Court's intimation, *ante*, p. 9—surely stretched to the breaking point—that Mr. Justice Brandeis and the unanimous Court for which he spoke would have reached a contrary conclusion in *Jewell-LaSalle* in 1931 had that broadcaster been licensed. The Court dances around *Jewell-LaSalle*, as indeed it must, for it is potent opposing precedent for the present case and stands stalwart against respondent Aiken's position. I think we should be realistic and forthright and, if *Jewell-LaSalle* is in the way, overrule it.

Although I dissented in *Teleprompter*, that case and *Fortnightly*, before it, have been decided. With the Court insisting on adhering to the rationale of those cases, the result the Court of Appeals and the Court reaches here is compelled. Accepting the precedent of those cases, I concur in the result.

SUPREME COURT OF THE UNITED STATES

No. 74–452

Twentieth Century Music Corporation et al., Petitioners, *v.* George Aiken.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[June 17, 1975]

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE DOUGLAS joins, dissenting.

In *Fortnightly Corp.* v. *United Artists*, 392 U. S. 390, 402 (1968), Mr. Justice Fortas observed that cases such as this call "not for the judgment of Solomon but for the dexterity of Houdini." There can be no really satisfactory solution to the problem presented here, until Congress acts in response to long standing proposals. My primary purpose in writing is not merely to express disagreement with the Court but to underscore what has repeatedly been stated by others as to the need for legislative action. Radio today is certainly a more commonplace and universally understood technological innovation than CATV, for example, yet we are, basically, in essentially the same awkward situation as in the past when confronted with these problems. We must attempt to apply a statute designed for another era to a situation in which Congress has never affirmatively manifested its view concerning the competing policy considerations involved.

Yet, the issue presented can only be resolved appropriately by the Congress; perhaps it will find the result which the Court reaches today a practical and equitable resolution, or perhaps it will find this "functional

analysis" [1] too simplistic an approach, cf. *Teleprompter* v. *CBS*, 415 U. S. 394, 415 (BLACKMUN, J., dissenting), and opt for another solution.

The result reached by the Court is not compelled by the language of the statute; it is contrary to the applicable case law and, even assuming the correctness and relevance of the CATV cases, *Fortnightly*, *supra*, and *Teleprompter*, *supra*, it is not analytically dictated by those cases. In such a situation, I suggest, "the fact that the Copyright Act was written in a different day, for different factual situations, should lead us to tread cautiously here. One major object . . . should be to do as little damage as possible to traditional copyright principles and to business relationships, until Congress legislates and relieves the embarrassment which we and the interested parties face." *Fortnightly*, *supra*, at 404 (Fortas, J., dissenting).

As the Court's opinion notes, *ante*, at 9, in *Buck* v. *Jewell-LaSalle*, 283 U. S. 191 (1931), answering a precisely phrased certified question, the Court construed the Copyright Act in a manner which squarely conflicts with what is held today. Congress, despite many opportunities, has never legislatively overruled *Buck* v. *Jewell-LaSalle*, *supra*. It was not overruled in *Fortnightly* but treated "as limited to its facts." 392 U. S. 396–397, n. 18. Even assuming the correctness of this dubious process of limitation, see *Fortnightly*, *supra*, at 405 (Fortas, J., dissenting), *Teleprompter*, *supra*, at 415 (BLACKMUN, J., dissenting), *Buck* is squarely relevant here since the license at issue expressly negated any right on the part of the broadcaster to further license performances by those who commercially receive and distribute broadcast music. Moreover, even accepting,

[1] "[B]roadcasters perform: Viewers do not perform." *Fortnightly Corp.* v. *United Artists*, 392 U. S. 390, 398 (1968).

arguendo, the restrictive reading given to *Buck* by the Court today, and assuming the correctness of *Fortnightly* and *Teleprompter* in the CATV field, it is not at all clear that the analysis of these latter cases supports the result here.[2] Respondent was more than a "passive beneficiary." *Fortnightly*, *supra*, at 399. He took the transmission and used that transmission for commercial entertainment in his own profit enterprise, through a multispeaker audio-system specifically designed for his business purposes.[3] In short, this case does not call for what the Court describes as "a ruling that a radio listener 'performs' every broadcast that he receives . . ." *ante*, at 11. Here, respondent received the transmission and then put it to an independent commercial use. His conduct seems to me controlled by *Buck*'s unequivocal holding that:

> "[O]ne who hires an orchestra for a public performance for profit is not relieved from a charge of infringement merely because he does not select the particular program to be played. Similarly, when he tunes in on a broadcasting station, for his own commercial purposes, he necessarily assumes the risk that in so doing he may infringe the performing rights of another." 283 U. S., at 198–199.

See also *Herbert* v. *Shanely Co.*, 242 U. S. 591 (1917).

In short, as MR. JUSTICE DOUGLAS observed in the

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[2] Recent congressional proposals have treated the present problem distinctly from CATV questions. See, *e. g.*, S. 1361, 93d Cong., 2d Sess. (1974). See also British Copyright Act, § 48 (5) (6).

[3] Indeed, in its consideration of S. 1361, the Senate Committee on the Judiciary undertook to distinguish use of "ordinary radios" from situations "where broadcasts are transmitted to substantial audiences by means of loudspeakers covering a wide area." S. Rep. No. 93-983, 93d Cong., 2d Sess., 130 (1974). The value of this distinction, without drawing a line on the number of outlets that would be exempt is at best dubious; this version leaves the obvious gap in the statute to be filled in by the courts.

Teleprompter case, "[t]he Court can read the result it achieves today only by 'legislating' important features of the Copyright Act out of existence." 415 U. S., at 421. In my view, we should bear in mind that "[our] ax, being a rule of law, must cut straight, sharp, and deep; and perhaps this is a situation that calls for the compromise of theory and for the architectural improvisation which only legislation can accomplish." *Fortnightly, supra,* at 408, dissenting opinion of Fortas, J.